DOCUMENT RESUME

ED 084 540 CS 200 832

TITLE	Newsmen's Privilege. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 93rd Congress, 1st Session on S.36, S.158, S.318, S.451, S.637, S.750, S.870, S.917, S.1128 and S.J. Res. 8: Bills to Create a Testimonial Privilege for Newsmen.
INSTITUTION	Congress of the U.S., Washington, D.C. Senate Committee on the Judiciary.
PUB DATE	73
NOTE	764p.
AVAILABLE FROM	Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (Stock No. 5270-01844, $3.70 domestic postpaid or $3.25 GPO bookstore)
EDRS PRICE	MF-$0.65 HC-$26.32
DESCRIPTORS	*Federal Legislation; *Freedom of Speech; Government Role; *Journalism; *Legal Problems; *News Media; Press Opinion; Public Opinion
IDENTIFIERS	*Testimonial Privilege

ABSTRACT

The United States Senate Subcommittee on Constitutional Rights, Committee of the Judiciary, held hearings in February and March 1973 to consider the question of whether the government should be permitted to compel the press to reveal the identity of confidential sources of information or the content of unpublished information. A number of bills to create a testimonial privilege for news personnel were proposed for the 93rd Congress and were heard before this committee. Opening statements by several subcommittee members, the testimony of 39 witnesses, statements submitted for the record, the texts of the proposed bills and resolutions, judicial decisions bearing on the issue, newspaper and magazine articles, correspondence, and other miscellaneous materials are included. (TO)

ED 084540

NEWSMEN'S PRIVILEGE

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 36, S. 158, S. 318, S. 451, S. 637, S. 750
S. 870, S. 917, S. 1128 AND S. J. RES. 8

BILLS TO CREATE A TESTIMONIAL PRIVILEGE FOR NEWSMEN

FEBRUARY 20, 21, 22, 27, MARCH 13 AND 14, 1973

Printed for the use of the Committee on the Judiciary

93-474

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

For sale by the Superintendent of Documents,
U.S. Government Printing Office, Washington, D.C. 20402
Price $3.70 domestic postpaid or $3.25 GPO Bookstore
Stock Number 5270-01844

CS 200 832

FILMED FROM BEST AVAILABLE COPY

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

JOHN L. McCLELLAN, Arkansas
SAM J. ERVIN, Jr., North Carolina
PHILIP A. HART, Michigan
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
QUENTIN BURDICK, North Dakota
ROBERT C. BYRD, West Virginia
JOHN V. TUNNEY, California

ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
HUGH SCOTT, Pennsylvania
STROM THURMOND, South Carolina
MARLOW W. COOK, Kentucky
CHARLES McC. MATHIAS, Maryland
EDWARD J. GURNEY, Florida

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

SAM J. ERVIN, Jr., North Carolina, *Chairman*

JOHN L. McCLELLAN, Arkansas
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOHN V. TUNNEY, California

EDWARD J. GURNEY, Florida
ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
STROM THURMOND, South Carolina

LAWRENCE M. BASKIR, *Chief Counsel and Staff Director*
BRITT SNIDER, *Counsel*
LEONARD M. APCAR, *Research Assistant*

CONTENTS

HEARING DAYS

	Page
Tuesday, February 20, 1973	1
Wednesday, February 21, 1973	95
Thursday, February 22, 1973	145
Tuesday, February 27, 1973	213
Tuesday, March 13, 1973	315
Wednesday, March 14, 1973	379

TESTIMONY

Opening Statements:	
Ervin, Hon. Sam J., Jr., U.S. Senator from North Carolina, chairman, Constitutional Rights Subcommittee:	
February 20, 1973	1
February 27, 1973	213
March 13, 1973	315
Gurney, Hon. Edward J., U.S. Senator from Florida, February 20, 1973	25
Hruska, Hon. Roman L., U.S. Senator from Nebraska, February 20, 1973	31
Kennedy, Hon. Edward M., U.S. Senator from Massachusetts, February 20, 1973	12
Tunney, Hon. John V., U.S. Senator from California, February 20, 1973	15
Witnesses:	
Amsterdam, Anthony G., professor of law, Stanford University School of Law	176
Bell, Hon. Alphonzo, a Representative in Congress from the 29th District of the State of California	402
Blasi, Vincent, professor of law, the University of Michigan Law School	136
Bradley, Jack L., president, National Press Photographers Association	246
Branzburg, Paul M., newspaper reporter, the Detroit Free Press	356
Caldwell, Earl, newspaper reporter, the New York Times	85
Cherniss, Norman A., executive editor, the Press and Daily Enterprise, Riverside, Calif	346
Clark, Hon. Dick, U.S. Senator from Iowa	214
Cranston, Hon. Alan, U.S. Senator from California	45
Dixon, Robert G., Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice, accompanied by Ms. Mary Lawton, Deputy Assistant Attorney General; and Mr. Michael Buxton, Office of Legal Counsel	330
Eagleton, Hon. Thomas F., U.S. Senator from Missouri	100
Fichenberg, Robert G., chairman, Freedom of Information Committee, American Society of Newspaper Editors, executive editor, the Knickerbocker News-Union Star	249
Finnegan, John, chairman, Freedom of Information Committee of the Associated Press Managing Editors Association	373
Gora, Joel, counsel, American Civil Liberties Union, accompanied by Brit Hume, journalist and author	110
Graham, Fred P., reporter, CBS News, on behalf of the Reporters Committee on Freedom of the Press, accompanied by Jack C. Landau, reporter, Newhouse News, on behalf of the Reporters Committee on Freedom of the Press	59 59
Harrison, Charles F., president, Radio-Television Directors Association; accompanied by Lawrence Scharff, general counsel	352
Hatfield, Hon. Mark, U.S. Senator from Oregon	316
Kilpatrick, James J., columnist, the Washington Star Syndicate	79

Page
Korry, Edward M., president, Association of American Publishers, Inc 160
Mellinkoff, Abe, city editor and columnist, the San Francisco Chronicle 367
Mondale, Hon. Walter F., U.S. Senator from Minnesota 32
Morgenthau, Dr. Hans J., professor, City College of New York 392
O'Hara, John J., president-elect, National District Attorneys Association; accompanied by William Cahn, past president, National District Attorneys Association 226
Payette, William C., president, Sigma Delta Chi 300
Pearson, Hon. James B., U.S. Senator from Kansas 8
Percy, Hon. Charles H., U.S. Senator from Illinois 217
Perlik, Charles S., Jr., president, the Newspaper Guild, AFL-CIO; accompanied by James M. Cesnik, director, Research and Information, the Newspaper Guild 305
Reid, Hon. Ogden R., Representative in Congress from the 26th District of the State of New York 321
Richman, Martin F., chairman, Committee on Legislation of the Association of the Bar of the City of New York; accompanied by Benno Schmidt, professor, Columbia University School of Law 379
Rockefeller, Hon. Nelson A., Governor, the State of New York 153
Schweiker, Hon. Richard S., U.S. Senator from Pennsylvania 95
Smith, Stanford, president, American Newspaper Publishers Association; accompanied by Arthur B. Hanson, counsel; and Len H. Small, chairman, Committee on Government Relations 128
Stanton, Frank, vice chairman, Columbia Broadcasting Systems, Inc 167
Thomas, William F., editor, the Los Angeles Times; accompanied by Robert S. Warren, counsel; John Lawrence, chief, Washington Bureau, the Los Angeles Times; and Jack Nelson, reporter, the Los Angeles Times 281
Wald, Richard C., president, NBC News, National Broadcasting Co., Inc 293
Waldie, Hon. Jerome R., Representative in Congress from the 14th District of the State of California 253
Weicker, Hon. Lowell P., Jr., U.S. Senator from Connecticut 145
Weiler, Joseph, reporter, the Commercial Appeal, Memphis, Tenn 241
Witt, Evans, editor, the Daily Tar Heel, University of North Carolina 397
Statements submitted for the record:
  Abzug, Hon. Bella S., Representative in Congress from the 20th District of the State of New York 540
  Bradsell, Bob, producer, Iowa Educational Broadcasting Network 543
  Bridge, Peter, journalist 547
  Cannon, Hon. Howard W., U.S. Senator from Nevada 551
  Citizens' Right to News Committee 552
  Communications Workers of America, the 557
  Eginton, William, Iowa City Press-Citizen 559
  Fogel, Dick, assistant managing editor, Oakland Tribune 560
  Jenner, Albert E., Jr., attorney 561
  Karp, Irwin, counsel, the Authors League of America 567
  Koch, Hon. Edward I., Representative in Congress from the 18th District of the State of New York 573
  Lower, Elmer W., president, ABC News 575
  McGovern, Hon. George, U.S. Senator from South Dakota 576
  Miller, Edward D., executive editor, Call-Chronical Newspapers; and Paul D. Lowe, president, Local 49, TNG 578
  Miller, Tom, Tucson, Ariz 599
  National Newspaper Association, the 500
  National Newspaper Publishers Association, the, a resolution 582
  Pennsylvania Newspaper Publishers' Association, the 583
  Society of Magazine Writers, Inc., the 584
  Stanton, Hon. James V., Representative in Congress from the 20th District of the State of Ohio 585
  Summers, John B., counsel, National Association of Broadcasters 587
  Whalen, Hon. Charles W., Jr., Representative in Congress from the 3rd District of the State of Ohio 588
  Williams, C. Dickerman, attorney 589
  Writers Guild of America, East, Inc 593

APPENDIX

Bills and resolutions:

Page
S. 36, Mr. Schweiker 409
S. 158, Mr. Cranston 412
S. 318, Mr. Weicker 419
S. 451, Mr. Hatfield 432
S. 637, Mr. Mondale 435
S. 750, Mr. Byrd (West Virginia) for Mr. Bentson 441
S. 870, Mr. Eagleton 447
S. 917, Mr. Ervin 452
S. 1128, Mr. Ervin 456
S.J. Res. 8, Mr. Hartke 407

Judicial Decisions:

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 463
Caldwell v. *United States*, 408 U.S. 665 (1972) 464
In the Matter of Paul Pappas, 408 U.S. 665 (1972) 464
Caldwell v. *United States*, 434 F. 2d 1081 (9th Cir. 1970) 498
In the Matter of Peter Bridge, 295 A. 2d 3 (1972) 568
Farr v. *Superior Court*, 22 C.A. 3d 60-Cal. Rptr.-(1972) 513
Cervantes v. *Time, Inc.*, 464 F 2nd 986 (8th Cir. 1972) 527
Democratic National Committee, et al., v. *James W. McCord, et al.*, D.D.C., Civil Action Nos. 1233–72, 1847–72, 1854–72, filed March 22, 1973. (Opinion of Judge Richey) 537

Newspaper and magazine articles:

Arnold, Mark R., "Pressure on the Press Alarms Newsmen," the National Observer, December 30, 1972 594
"The Case for a Shield Law," the Boston Globe, January 27, 1973 598
Crawford, Kenneth, "The Press Can Defend Its Own Freedom," the Washington Post, March 18, 1973 599
Friendly, Fred W., "Beyond the *Caldwell* Decision—Justice White and Reporter Caldwell: Finding a Common Ground," Columbia Journalism Review, September/October 1972 600
Gordon, Eda M., "The Scholar Invokes His 'Privilege'," Trial, January/February 1973 606
Hume, Brit, "A Chilling Effect on the Press," New York Times Magazine, December 17, 1972 611
Isaacs, Norman E., "Beyond the *Calduell* Decision: There May Be Worse to Come from this Court," Columbia Journalism Review, September/October 1972 618
Knight, John S., "Shield Laws Can Be Risky: First Amendment Protects Best," the Charlotte Observer, March 18, 1973 625
Loeb, William, "A Shield for Liars," the Manchester Union Leader, January 20, 1973 626
Mollenhoff, Clark, "Let's Take a Closer Look at 'Shield Laws'," Human Events, February 24, 1973 627
Pryor, Charles W., "Let's Name these Nameless 'Informed Sources'," the Detroit News, February 18, 1973 631
"Quis Custodiet Custodes?" Judicature, January, 1973 632
Reston, James, "The Government and the Press," the New York Times, February 10, 1973 634
Rosenthal, A. M., "The Press Needs a Slogan: 'Save the First Amendment!" the New York Times Magazine, February 11, 1973 635
Royster, Vermont, "Dubious Shield," February 28, 1973 642
Schmidt, Benno C., Jr., "Beyond the *Caldwell* Decision: The Decision is Tentative," Columbia Journalism Review, September/October 1972 644
"A Shield for Your Right," Newsday, February 1, 1973 649
"Who's Hobbling the Press?" the New Republic, December 16, 1972 650

Speeches:

Ervin, Sam J., Jr., "Supreme Court Undermines Freedom of the Press," remarks before U.S. Senate, July 24, 1972 652
Ervin, Sam J., Jr., "Is the Press Being Hobbled?" Chapel Hill, N.C., January 19, 1973 655
Ervin, Sam J., Jr., "The President and the Press," Lubbock, Tex., February 16, 1973 659

Page

Correspondence:

- Charleston, Wallace, to Senator Sam J. Ervin, Jr. 663
- Dardanell, Edward L., president, Suburban Newspapers of America, to Senator Sam J. Ervin, Jr. 664
- Feldman, A. Daniel, memorandum to Senator Walter Mondale 665
- Galt, A. G., to Senator Sam J. Ervin, Jr. 666
- Green, Robert W., senior editor of investigations, Newsday, Inc., to Senator Sam J. Ervin, Jr. 667
- Hayes, Wallace D., to Senator Sam J. Ervin, Jr. 668
- Kanarek, I. A., counsel, to Senator Sam J. Ervin, Jr. 670
- Kilmer, Forrest, editor, Times-Democrat, to Senator Dick Clark 670
- Lavery, Bee Canterbury, president, University of Southern California Journalism Alumni Association, to Senator Sam J. Ervin, Jr. 670
- Morgenthau, Hans J., in response to the letter of Henry M. Wriston, to the New York Times 671
- O'Brien, John G., to Senator Sam J. Ervin, Jr. 673
- Poston, Jon, news director, KMEG–TV, to Senator Dick Clark 674
- Wriston, Henry M., to the New York Times 671
- Wriston, Henry M., in response to the letter of Hans J. Morgenthau, to the New York Times 672
- Zielenziger, David, chairman, the Daily Princetonian, to Senator Sam J. Ervin, Jr. 674

Other material:

- "Activities involving Subpoenas to Newsmen Since the Issuance of the Attorney General's Guidelines," Department of Justice memorandum 675
- An Analysis of Newsman's Privilege Legislation before the 93d Congress as of February 15, 1973, the American Newspaper Publishers Association 680
- Citizens' Right to News Committee, position paper, "The First Amendment and the Fair Administration of Justice" 689
- "Guidelines for Subpenas to the News Media," Department of Justice Memorandum to U.S. attorneys 699
- Journalists' Privilege Legislation, report of the Committee on Federal Legislation, the Association of the Bar of the City of New York 700
- Poll of State attorneys general prepared by American Newspaper Publishers Association 721
- State Newsmen's Privilege Legislation and cases arising thereunder, with addendums, the American Newspaper Publishers Association 723
- The Subpena Log: A compilation of cases involving the press as of March 1, 1973, Reporters Committee on Freedom of the Press 752
- Synopsis of Newsmen's Privilege Legislation, staff of the Subcommittee on Constitutional Rights 758

NEWSMEN'S PRIVILEGE HEARINGS

TUESDAY, FEBRUARY 20, 1973

U.S. Senate,
Subcommittee on Constitutional Rights,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 1202, the Dirksen Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin (presiding), Kennedy, Tunney, and Gurney.

Also present: Lawrence M. Baskir, chief counsel and staff director; and Britt Snider, counsel.

Senator **Ervin**. The subcommittee will come to order.

Thomas Jefferson wrote in 1787:

> The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

The Founding Fathers, of course, decided that we should have both Government and newspapers. Ever since then we have time and again sought to reconcile asserted Government necessity—warranted or not—to the demands of the first amendment. And today, almost 200 years later, we again find ourselves attempting to define the relationship between these two essential components of our society. Specifically, we will consider in these hearings the question of whether Government should be permitted to compel the press to reveal the identity of confidential sources of information or the content of unpublished information.

The subcommittee held hearings in late 1971 and early 1972 entitled "Freedom of the Press," and a considerable amount of testimony on the desirability of such an innovation was heard at that time.

The controversy, however, goes back considerably further. Back, in fact, at least a century. The first reported case of a newsman refusing to reveal the source of a news story to a grand jury was in 1874. There have been sporadic instances ever since. The courts, traditionally unhappy about evidentiary privileges which limit judicial access to information, by and large have refused to recognize a common law right of reporters not to identify sources or to disclose confidential information.

As a consequence, some 18 State legislatures have seen fit to pass laws providing for some type of protection. To this point, the Congress has not, although bills providing for a newsmen's privilege have been introduced in the Congress since 1929.

The situation, until the present controversy arose, has largely been one of an informal accommodation between newsmen and prosecutors. The newsman has been willing to give testimony under certain conditions, and prosecutors have sometimes been willing to recognize the harm to confidential sources in those cases where the reporter balked. Often they did not press their demands for testimony. Of course, where demands were pressed, the reporter faced a jail sentence for contempt if he insisted on remaining silent. If court challenges ensued, inevitably the reporter would lose. Even in States which had protective statutes, courts have been prone to look for ways to get around them, and thereby obtain the newsman's testimony.

Despite the frequency of these clashes, no case involving this matter had ever come to the Supreme Court until last June, when in a controversial 5 to 4 decision the Court ruled that the first amendment's guarantee of a free press did not entitle a newsman to refuse to reveal his confidential source to a grand jury. Justice White, writing for the majority, stated:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. . . . We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevent questions put to them in the course of a valid grand jury investigation or criminal trial. . . . [T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen.

Justice Stewart, in his dissent, took issue with the practical effect of the majority's holding, and urged a qualified privilege of his own:

> We cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished. . . . A corollary of the right to publish must be the right to gather news. . . . I would hold [in order for a grand jury to compel testimony from a newsman] that the government must (1) show that there is a probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law: (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

In a separate concurring opinion, Justice Powell indicated that the Court may not in the future turn deaf ears upon newsmen if the Government can be shown to have harassed the newsmen, or has otherwise not acted in good faith in the conduct of its investigation or inquiry. But for now the Court has left it to the Congress to determine the desirability and the necessity for statutory protection for newsmen. This is precisely the point of our deliberations over the next 2 weeks.

Certainly what has happened since the Supreme Court's decision has not allayed our concern. We have been witness to the spectacle of several reporters being sent to jail for their refusals to identify confidential sources or to make available unpublished materials. To be sure, most of the recent cases have involved State, rather than Federal proceedings; but they indicate nonetheless that the *Caldwell* decision may have been the green light which prosecutors and judges alike were waiting for. The large volume of mail which the subcommittee has received on this matter indicates substantial public concern that the *Caldwell-Branzburg* case may seriously stifle access to news and information.

Our problem, then, in a nutshell, is to decide whether or not to adopt some form of statutory protection and, if so, what form that protection should take. In doing so we must resolve many very delicate issues. We face a complicated legislative responsibility not unlike the one the Founding Fathers dealt with 200 years ago, and I do not presume that we have the same wisdom as they. It would have been far better if the Court had properly faced the issue last June. To write legislation balancing the two great public interests of a free press and the seeking of justice is no easy task. This is a problem better approached through case-by-case litigation rather than through inflexible statutory words. Nonetheless, we must try.

First of all, does the lack of a testimonial privilege for newsmen really present a problem? There has never been such a Federal privilege before, and yet sources of information have obviously not "dried up." There has always been a threat that the newsman may be called before a court or grand jury, and forced to reveal his sources. Yet certainly there has been continuing disclosure by informants since the beginning of the Republic.

On the other hand, we will never know how much we might have known had not this threat of a press subpena and ultimate exposure been hanging over the sources of confidential information. It does stand to reason that sources would be more reluctant to come forward and reporters more reluctant to publish, when to do so may subject them to subpena and an indeterminate jail sentence. A. M. Rosenthal recently wrote:

> It seems entirely plain that the destruction of confidentiality of news sources will have an impact on how much the public knows about every aspect of public affairs. There will simply be fewer and fewer people in Government and out of Government willing to take the risk that the press will be able to protect them. It will not all happen tomorrow but it will happen as long as this country is ready to say that the price of dissidence is exposure.

To be sure, there are competing interests involved. On the one hand is society's interest in being informed—in learning of crime, corruption or mismanagement.

> Enlightened choice by an informed citizenry—

Wrote Justice Stewart—

> is the basic ideal upon which an open society is premised . . . not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.

On the other hand, we have the pursuit of truth in the courtroom. It is the duty of every man to give testimony. The sixth amendment specifically gives a criminal defendant the right to confront the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. Society, too, has a marked interest in identifying and punishing the violators of its laws. All of this must necessarily be made more difficult by any testimonial privilege.

In addition to the effects on law enforcement and the administration of justice, the public also worries that such a testimonial privilege will become a shield behind which irresponsible journalists may hide. Without revealing sources there is no means of evaluating the accuracy or fairness of news reporting, nor indeed whether the story is not a complete fabrication. One outraged citizen recently wrote to me expressing his doubts about the license a testimonial privilege would give members of the press:

> The public is uninformed about the issues in regard to newsmen's privilege, and it is largely the press' fault. This biased and weighted treatment is as disturbing as the alleged repression which shield legislation purports to correct. . . . How can the public judge the trustworthiness of news gathered by the media from anonymous informants or secret sources? Would not shield legislation encourage irresponsible newsmen to obtain information by theft or bribery? Would not it impede criminal prosecutions of newsmen if they had written about it? What is to prevent a newsman from asserting truth as a defense in a libel suit and then refusing to tell who the source was? If the reporter identifies his source as a member of a group, is not the entire group tainted when he refuses to reveal the name of the informer? Finally, should a privilege so susceptible of abuse be granted a profession which has no code of ethics or internal structure for disciplining its members?

These are not idle questions.

It is also significant that even some in the press have doubts about the wisdom of such legislation. They feel that, after all, the first amendment is an unequivocal guarantee of a free press which should not be tampered with. Any legislation must unavoidably have the effect of limiting that guarantee. They look upon this legislation as bad precedent.

Furthermore, there is a serious problem of constitutional policy which must be faced. The Justice Department, in hearings before the House earlier this month, warned that legislative protection of the press may well lead to legislation regulation. That is not an idle worry. The same Congress which grants the privilege may condition it on proper conduct. A future Congress, irritated by a critical press, may hold repeal of the privilege as a threat to secure a more compliant press. What is now protective legislation may tomorrow be a hostage to good behavior.

The first amendment does not contemplate that the press hold its rights at the sufferance of the Congress any more than of the President. The great right and responsibility conferred by the Constitution on the press has its price. And the price is that the press must fight its own battles. It may not come running to Congress as soon as the going gets rough.

The great rights the press now enjoys were not conferred as a gift from Congress. Quite the contrary. They were wrested from a reluctant, and more accurately, an antagonistic government. When the press was licensed, publishers went to jail to win the freedom to publish.

When prior censorship existed, they fought with their bodies and their fortunes.

When seditious libel was a crime, they nonetheless criticized King and Parliament, and went to jail for the privilege.

They did the same when the sedition law was enacted, and when colonial governors and legislators sought to restrict knowledge of their activities to official pronouncements.

Both before and after *Caldwell*, reporters and editors have gone to jail to defend their rights under the first amendment, regardless of what courts and legislators felt.

This is not the first era when the press has had difficulties. Indeed, despite the warnings expressed by Rosenthal and others, one may well question whether the press is now under greater fire than at other times in our history.

There is a way to resolve this problem which is more difficult than legislation, but far preferable. That is to call upon the press to read its own courageous history. If reporters, editors, and publishers read this history, they would not come petitioning to Congress, but would win this point like they won the other elements of their freedom in times past. They would lay their personal freedom on the line like Mr. Caldwell, Mr. Weiler, Mr. Bridge, and others have done.

It is against these general considerations that we must view the need for affirmative legislative action.

To be sure, the press feels threatened and intimidated by a hostile administration. It has begun to wonder whether it is still able to fulfill its role as a conveyor of information to the public. Members of this administration have publicly castigated and threatened press and broadcast media. Proposals have been made to set up standards for the renewal of broadcast licenses which are little more than transparent attempts to censor unfavorable comment. Funds for public broadcasting have been vetoed and public affairs programing, sometimes critical of the administration, has been curtailed. The FBI spends its time trying to catch critical reporters in illegal conduct.

The administration's stance with regard to the newsmen's privilege while not one of vehement hostility has nonetheless been one of resistance. In the early months of the administration, there was an unusual rash of subpenas issued against the news media. It was stated at our prior hearings that CBS and NBC alone received 121 subpenas in the first 30 months of the Nixon administration.

Amid mounting hostility from the media, Attorney General Mitchell promulgated in 1970 a set of guidelines which remain in effect today. They recognize in principle the value of preserving a free flow of information to the public, and set certain standards for requiring newsmen to reveal confidential information in Federal proceedings. Final authorization for the issuance of subpenas is left with the Attorney General.

The Justice Department has argued that while it does not oppose a qualified statutory privilege in principle, it is unnecessary in view of these Justice Department guidelines.

The objection of the media has been couched not so much in terms of the substantive provisions of the guidelines, as to the Attorney General being the arbiter of press interests. It is tantamount to providing the administration with one more sword to hold over the head of the press.

Forming a backdrop for the charges of Government intimidation of the press is the matter of Government secrecy. Classification of documents has gone far beyond safeguarding information pertinent to the national defense. It is used to keep from the public information which the administration finds embarrassing or critical. Executive privilege is invoked to prevent Congress from receiving the testimony of administration officials which might prove embarrassing whether or not it relates to the national defense. Arthur Schlesinger recently said that the "secrecy system has become much less a means by which Government protects national security than a means by which Government safeguards its reputation, dissembles its purposes, buries its mistakes, manipulates its citizens, maximizes its power, and corrupts itself."

The growing realization that Government acts secretively has brought about almost an unprecedented credibility gap. As A. M. Rosenthal recently wrote:

> We have come to the point, sorrowfully, where we really do not *expect* our Governments to tell he whole truth or even a goodly part of it . . . we have come to the point where we *expect*, if not outright falsehood, then at least obscurity, double-talk, cover-up and euphemistic jargon from American officialdom. We have to remind ourselves that this time a government branch may be telling the whole truth, and how sad that is.

I raise the issue of Government secrecy, and the credibility gap which it engenders, to underscore the importance of free press and the necessity for keeping open inside sources of information. With the imposition of classification on documents and restraints on official spokesmen, it becomes doubly critical that the inside informants are not stymied by the threat of subsequent exposure. They are virtually the last resort of a public which is eager to be informed.

We now have pending before the subcommittee seven bills and one joint resolution which provide some type of statutory protection for newsmen. The Senators who have sponsored these measures have made the judgment that some form of protection for these sources is necessary. How that protection should be written involves a number of tough, complex issues.

First of all, should the testimonial privilege be qualified or should it be absolute? Or, as a third alternative, should it be absolute in some forums and qualified in others? Those bills which provide a qualified privilege attempt to set standards which must be met by the party seeking the information before the newsman is required to divulge sources or confidential information. While differing in specific qualifications, these bills all attempt to reconcile the interests in the administration of justice with the free flow of information. Those favoring an absolute privilege argue that it is impossible to accommodate the competing interests without critically limiting the newsmen's protection.

The second question is whether the privilege should apply only to Federal tribunals or to the States as well. It is undeniable that most of the cases involving newsmen subpenas have taken place in State courts. This is especially true since the Attorney General guidelines were issued. On the other hand, the Congress, if it applied the privilege to the States, would in effect be prescribing a rule of evidence for State tribunals, which is a preemptive act which the Congress has never done before. Whether this is wise or necessary is open to serious doubt. Even more troublesome is the question of Congress' constitutional authority to legislate such a privilege for the States. Many Senators who are favorable to protective legislation, like myself, might well oppose legislation which tried to cover the States.

A third area addressed by these proposals is the matter of who is a newsman. Who should be entitled to claim the privilege? The first amendment applies to all citizens, and protects their right to publish information for the public. But the testimonial privilege can, of course, not be available for all. Thus, a serious problem of definition is posed. It must be broad enough to offer protection to those responsible for news reporting, and yet not so broad to shield the occasional writer from his responsibility as a citizen. Any attempt at defining the scope of the privilege is in effect a limitation on the first amendment. It will confer first amendment protection on some who deserve it and deny it to others with powerful claims to its mantle. Do we include scholars as well as reporters? The weekly and monthly press as well as the daily? Freelance or only the regularly employed? TV cameramen? Underground papers? The radical press? We will be receiving testimony directly on this issue over the course of these hearings.

A fourth issue is whether the protection should extend only to the identify of confidential sources, or should it include unpublished confidential information. It is interesting to note that the vast majority of State statutes protect only the confidential source and information which could lead to his identity. Other unpublished information is fair game for the courts.

Separate policy considerations underlie these two categories. With the protection of confidential sources, we are interested in preserving the identity of informants. With the protection of unpublished information, it is the integrity of the newsman which is at stake. For some reason, the information was not published. A reporter may have pledged that it would not be. It may have been uncorroborated or unreliable. Or it simply might not have represented the quality of work which he customarily produced. Should such information be available for the courts? It is another question which we must answer.

A fifth issue which must be addressed, whether or not the privilege is to be absolute or qualified, is the procedural mechanism for asserting or divesting the privilege. As is often the case, the effectiveness of the substantive provisions may well depend on the method by which they are employed. Under the typical procedure, the newsman is issued a subpena and has the choice of either moving to quash the subpena, or appearing at the proceeding. If he appears at the proceeding and is asked a question relating to confidential material, he may object.

If there is a statutory privilege, he may assert the statute, either in a motion to quash the subpena or in response to a question he does not wish to answer. Both of these procedures leave the burden on the newsman to show that he is entitled to the protections of the statute.

A better solution from the point of view of a newsman would be to have the burden of showing that he is not entitled to the protection of the statute rest with the party who seeks the information. To accomplish this result, some of the bills specifically provide for a separate proceeding to commence upon the assertion of the privilege. Other bills provide even stronger protection by having the party seeking the information institute a separate proceeding to decide whether the newsman is entitled to the protection of the statute before the issuance of a subpena.

A sixth and final issue which is involved in a newsman's privilege is its applicability to libel and other civil suits. Critics urge that in a libel suit in which the newsman is a defendant and where the defense is based on the truth of what he has written, a newsman should not be allowed to hide behind the privilege and refuse to identify the source or information he was relying upon. To allow this, it is argued, would render ineffective the only protection which citizens have against being libeled, and the only way to make the press accountable. Some of the pending bills thus make exceptions for libel suits.

There are those who argue, on the other hand, that if this exception is made, public officials will file libel suits simply to identify inside sources who make embarrassing disclosures. Whether this is a significant problem is a matter to which we will turn our attention in the forthcoming sessions.

Finally, as a word of warning, I mention the impact which the proposed Federal rules of evidence could have on existing protection for newsmen even in the event no Federal statute is passed.

The proposed rules of evidence which have been transmitted by the Supreme Court to the Congress provide that no testimonial privilege will apply in Federal courts unless it is specifically provided for under the rules or by Federal statute.

If no Federal newsman's privilege is forthcoming, this means that Federal courts will not be able to recognize the testimonial privileges of the States in which they are sitting. For the 18 States with such laws, newsmen involved in Federal proceedings would have even less protection than they now have.

Furthermore, at least one Federal circuit has ruled that in a libel suit filed by a public official in Federal court, a newsman may still assert a privilege not to reveal his sources despite the *Caldwell* decision. If there were no Federal statute, and the new rules went into effect, then presumably even the narrow privilege which Federal courts have allowed newsmen in civil suits would no longer apply.

While the approval of the proposed rules by Congress is far from assured, we should take note of this potential problem. I am hopeful some of our witnesses will devote some of their time to it.

Assisting us in these deliberations will be prominent spokesmen from the press and broadcast media, law professors, reporters, columnists, law enforcement agencies and the Congress. I welcome their participation and their ideas. Drafting a newsmen's privilege is not a problem which lends itself to easy solutions.

I am sorry to say that Senator Pearson, who for many years has been the Senate's leading advocate of a newsman's privilege, and who was originally scheduled to testify this morning, is not feeling well and will be unable to be with us. I do have his statement, however, which, without objection, I will insert in the record at this point.

[The document referred to follows:]

STATEMENT OF SENATOR JAMES B. PEARSON (R., KANSAS) BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS COMMITTEE ON THE JUDICIARY, U.S. SENATE

Mr. Chairman and members of the subcommittee, I am honored and pleased to have this opportunity to discuss the proper role of Congress in perfecting Freedom of the Press in modern America. After some introductory remarks on the significance of the First Amendment's "Free Press" guarantee, I will devote the balance of my statement to an advocacy of the Newsmen's privilege.

I believe that legislation limiting the power of compulsory process by the Federal government over newsmen is a precondition to the unfettered dissemination of the news. Thus, I believe that such legislation will complement and strengthen the First Amendment to the Federal Constitution.

The press must be free to report on the human condition in America, on the conduct of public officials, on the strengths and weaknesses of this society and its institutions. Freedom of the Press is a liberty required by *all* the people: The term does not connote a privilege of a particular occupational group.

I. CONGRESS SHALL MAKE NO LAW . . . ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS

There is no question that the Founding Fathers appreciated the significance of the First Amendment "free press" guarantee. The Virginia Declaration of Rights of 1776, in Article XII, stated "That the Freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic governments." Madison wrote that "Popular government without popular information or the means of acquiring it is but a prologue to a farce, or tragedy, or perhaps both."

Perhaps Thomas Jefferson captured the contemporary passion for press freedom when he remarked, "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter."

The framers of the First Amendment had the benefit of the recently published work, Blackstone's *Commentaries on the Law of England.* Sir William had set forth the following common law definition of press freedom:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and *not* in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the Freedom of the Press; but if he publishes what is *improper, mischevious,* or *illegal,* he must take the consequences of his own temerity."

Blackstone's attitude toward the *accountability* of the press, reflecting English common law, was partially embraced as United States law by those who secured passage of the Sedition Act of 1798. This Act made it a Federal crime to engage in "False, scandalous and malicious" criticism of public officials.

But Madison, for one, wrote a scathing denunciation of the Sedition Act: "This idea of freedom of the Press can *never* be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a familiar effect with a law authorizing previous restraint on them. It would be a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made."

Thus Madison artictulated, perhaps for the first time, a doctrine that is widely respected today: Press freedom cannot tolerate governmental action which has a "chilling effect" on the communication of ideas. Only in the most compelling circumstances, involving the survival of life or the State itself, is a competing state interest permitted to override First Amendment liberties.

In my view, Mr. Chairman, Freedom of the Press is the *sine qua non* of men who would govern themselves. And never have the demands for a truly free press, or the demands upon newsmen themselves, been more compelling than at this time of increasing social awareness and public disaffection. Viable bridges of communication must span the gulf of misunderstanding and distrust which has separated too many for too long. The press, of course, is the primary medium of communication. Its contacts within all elements of society must be protected.

II. FREEDOM OF THE PRESS REQUIRES A REPORTER-INFORMANT PRIVILEGE.

The dissemination of the news is the primary obligation of professional reporters—but newsmen cannot meet this obligation without full opportunity to *gather* newsworthy information from confidential sources. The gathering of pertinent information *prior to publication* constitutes an inseparable and indispensable phase of the overall news effort

Newsmen maintain that confidential sources, in most cases, will refuse to contribute if subjected to the threat of exposure. Walter Cronkite, of CBS News, has made the following statement: "The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. . . . I certainly could not work effectively if I had to say to each person with whom I talk that any information he gave me might be used against him."

Mr. Chairman, the Cronkite statement reflects the collective judgment of the Press. Recognizing that some informants need assurances that their identities will not be compromised, the American Newspaper Guild adopted a Code of Ethics which, in Canon 5, states, "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigating bodies. . . ."

Professional newsmen for generations have protected confidential sources and information received in confidence. They have suffered contempt of court rather than reveal the sources upon which they depend for information of interest and value to the public. The issue presented by the proposed legislation to create a newsmen's privilege was joined in 1733, when John Peter Zenger began publication of the *New York Weekly Journal*. Zenger was charged with making "false scandalous, malicious and seditious publication" of information critical of the Governor of the Province. He chose jail rather than reveal his sources.

The issue has remained an important one throughout American history. Dozens of cases have been collected, both reported and unreported, in which newsmen have been cited for contempt because they have insisted that the identity of their sources is privileged information. The newsmen in these cases—spanning 240 years—have consistently maintained that their effectiveness as reporters of contemporary events would be irreparable harmed if confidential sources of sensitive information about public officials, and other subjects, were subject to exposure in judicial, legislative or administrative hearings.

It should not be surprising that no testimonial privilege for newsmen developed at common law. The common law perception of Freedom of the Press, as set down by Blackstone, contemplated the prosecution of newsmen for "improper" or "mischevious" publications. But "this idea of Freedom of the Press," as Madison said "can never be admitted to be the American idea of it." And so, the several state legislatures began to enact limited testimonial privileges for the newsmen of their jurisdictions in the late 19th Century. At least 18 states today have adopted some form of newsmen's testimonial privilege to maintain the confidentiality of sources, or information, or both.

The State of Maryland has had the benefit of a statutory newsmen's privilege since 1896. The Maryland law protects the source of any information published or broadcast by the media. I might note, parenthetically, Mr. Chairman, that there has been no general breakdown in the administration of justice in Maryland—at least to my knowledge—over the past 77 years, despite the fact that prosecutors and legislators in that State have *not* had the convenient opportunity to annex reporters as an investigative arm of the government.

To my knowledge, no State has ever repealed a newsmen's privilege statute. There may be cases, however, in which the courts of the several states have narrowly construed these laws.

In 1958, in the case of *Garland* v. *Torre*, a newspaperwoman for the first time asserted a First Amendment right to maintain the confidentiality of her sources and unpublished information obtained in a professional capacity. The Supreme Court in 1972 considered the subject First Amendment issue as a matter of first impression in the appeals of Paul Branzburg and Paul Pappas, and the appeal of the United States in the case of Earl Caldwell. The decision of the Court in these cases is well known to this Subcommittee.

Petitioners Branzburg and Pappas did *not* seek an absolute privilege against official interrogation in all circumstances. They did assert, however, that the reporter should not be forced either to appear or to testify before a grand jury or at a trial until and unless sufficient grounds are shown for believing:

(1) That reporter possesses information relevant to a crime under investigation;

(2) That the information the reporter has is unavailable from other sources; and

(3) That the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.

Respondent Caldwell defended the decision of the Ninth Circuit Court of Appeals which had held that the First Amendment provided a qualified testimonial privilege for newsmen. In the absence of a special showing of necessity by the government, the Circuit Court had held that Caldwell was privileged to refuse to attend a secret meeting of a grand jury because of the potential impact of such an appearance on the flow of information to the public.

The Court in a five-to-four decision rejected the claims of limited First Amendment protection for news sources in these cases, although the "enigmatic" concurring opinion of Mr. Justice Powell "may give some hope of a more flexible view in the future," as Mr. Justice Stewart suggested in his dissent. Mr. Justice Powell carefully emphasized the "limited nature of the Court's holding" in the Branzburg decision.

Mr. Chairman, I submitted testimony to this subcommittee on September 28, 1971, in support of a qualified newsmen's privilege. I continue to believe that a qualified newsmen's privilege is essential to facilitate the free and unfettered flow of information to the people. I continue to believe that Freedom of the Press, as that term is understood in America, demands the creation of a statutory newsmen's testimonial privilege to maintain the confidentiality of his sources and the information he has received from those sources.

III. THE CHALLENGE OF DRAFTING AN APPROPRIATE NEWSMEN'S PRIVILEGE BILL

Mr. Chairman, the Congress has before it the profoundly difficult and challenging task of drafting and enacting an appropriate newsmen's privilege law which balances the various and sometimes conflicting societal interests.

Thoughtful observers will acknowledge, as the Court has acknowledged, that aggressive investigative reporting can impair the Constitutional right of an individual to a fair trial.

The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ." The right to a grand jury proceeding extends to all persons accused of felonies in Federal criminal prosecutions, and a necessary concomitant of a grand jury proceeding is secrecy. The Constitutional right to grand jury protection against malicious prosecution may be fatally jeopardized if malicious individuals "leak" information to reporters about grand jury proceedings. Thus it may be necessary to compel reporters to identify those sources which compromise the secrecy of grand jury proceedings.

This exception to the newsmen's testimonial privilege may not be necessary, of course, in a state which does not constitutionally require felony indictment by grand jury.

In the bill which I offered for subcommittee consideration in the 92nd Congress, the privilege did not apply to the *source* of any allegedly defamatory information in any case where the defendant, in a civil action for defamation, *asserts a defense based upon the source of such information.* In the light of *New York Times Co.* v *Sullivan*, this exception in my judgment would permit reporters to maintain the confidentiality of sources on the activities of public personages absent actual malice by the news organization. But it would permit divestiture of the privilege when the defense of truth could not be maintained in actions brought by private persons.

The bill I proposed also would permit divestiture of the privilege if there is "substantial evidence that disclosure of the information (held by a reporter) is required to prevent a threat to human life, espionage or foreign aggression." This exception to the general rule of testimonial privilege for reporters is consistent with the holding of the Ninth Circuit in the *Caldwell* case that there be an "overriding and compelling" national interest in securing the testimony of the newsman.

From this testimony, Mr. Chairman, it is obvious that I am reluctant to embrace an absolute privilege. It would be most unwise, in my judgment, for the Congress to attempt to subsume all societal interests, including Constitutionally guaranteed rights, to the interest of enhancing the free flow of information.

The Congress has an opportunity to follow the lead of several states in perfecting Freedom of the Press, but it also has an obligation to respect the traditional "balancing" of interests in the process.

IV. THE QUESTION OF FEDERAL PREEMPTION OF STATE LAW

Finally, Mr. Chairman, I note that this subcommittee must consider the question of Federal preemption of State law in respect of a testimonial privilege for newsmen.

I must respectfully oppose all efforts to structure mandatory Federal rules of procedure for State courts, legislatures and administrative bodies. Newspapers are undoubtedly instrumentalities in interstate commerce, and Congress has undoubted powers of wide-ranging scope under the Commerce Clause (Art. I, sec. 8. cl. 3). But State courts, grand juries, legislatures and adminstrative bodies are most definitely *not* instrumentalities in interstate commerce.

If Congress were to arrogate unto itself all wisdom in the question of testimonial privileges for newsmen, the precedent thus established would devastate the principles of federalism upon which this country is founded. The Supreme Court has never invalidated a Congressional statute based upon the Commerce Clause—that is true. But perhaps Congress has shown some commendable restraint in past years, and I would recommend comparable restraint in this instance.

Mr. Chairman, if Congress creates a newsmen's privilege, it will *not* be for the benefit of a particular class of newsmen or informants. It will be for the benefit of consumers of the news—the American public. These consumers have a compelling interest in the free flow of information, but they also have an interest in their *other* rights and the system of Federalism we respect and are bound to accommodate.

I would urge your committee to prepare for Senate consideration a qualified newsmen's privilege bill, limited to the Federal system. I believe that such a bill would enhance personal liberties in this country. The Congress for too many years has explored the limits of constitutionally protected liberties, and legislated up to those limits in derogation of unrestricted freedom. In this question of the newsmen's privilege, we have the opportunity to expand the limits of Freedom of the Press. We should grasp that opportunity.

Thank you.

Senator **Irvin**. Also without objection I shall direct the subcommittee staff to include in the appendix the various bills and resolutions which bear on this subject, the staff memoranda prepared in connection with these hearings, the opinions of the Supreme Court and the Ninth Circuit Court in the *Caldwell* cacse, and certain letters, newspaper articles and statements which the subcommittee has received regarding this subject.

Senator Kennedy, I believe you have a statement.

Senator **Kennedy**. Thank you very much, Mr. Chairman. I think it is entirely appropriate that these hearings be chaired by you, Mr. Chairman, as the winner this past year of the George Polk Memorial Award for outstanding contributions to broadcast journalism and as one who has long been interested in this field. I think all of us in the Senate and across the country can feel assured about the thoroughness of these hearings and about the fairness and impartiality and commitment that you bring to this particular subject. I applaud you for commencing these hearings.

Of all the great principles on which our Nation was founded, none is more important than freedom of the press under the first amendment, and none is under greater attack in the Nation today.

Not since the Alien and Sedition Acts nearly 200 years ago has freedom of the press been as ominously threatened by the heavy hand of Government as it is at the present time. It is not too much to say that we have a crisis before us, a crisis over the first amendment, and the way we resolve that crisis in the coming months will have profound effects on the future of our country and all our other basic freedoms.

The right of the public to know and the right of the press to represent the public are twin pillars of our heritage. Any attempt to impose conditions upon this right strikes at the very core of our democracy—the right of the people to have access to the information which affects their lives. This is why I am pleased to give my support to Federal legislation providing newsmen with an absolute and unqualified privilege from compulsory process in both State and Federal forums.

We know that Congress is very much alone in the current struggle. Last June, the Supreme Court turned a deaf ear to plead that the Constitution itself is sufficient to protect reporters from being required to disclose their notes and sources to a grand jury. And, the executive branch professes to see no danger worthy of legislation in the present crisis.

For nearly 200 years, reporters and prosecutors have coexisted without the need for such legislation. In fact, throughout our history, reporters have enjoyed a de facto privilege from subpena in grand jury proceedings, a privilege of the sort consistently afforded to doctors, lawyers, priests, husbands and wives, and others whose special relationships of confidentiality have long received generous protection of society.

Today, under the present administration, all that has changed. Spurred on by the Vice President's persistent attacks on the press, by the "Pentagon Papers" case, and by a series of other Government-inspired assaults on the first amendment, the traditional freedom of the press has been seriously undermined, to the point where reporters now find themselves fair game for any aggressive or unscrupulous prosecutor armed with a fishing license stamped "subpena."

My own view is that the current situation is so serious that Congress should not hesitate to enact the broadest possible legislation designed to give newsmen an absolute and unqualified privilege from subpenas to disclose their notes and sources. The privilege should apply to all jurisdictions, Federal, State and local, and to all branches of Government, legislative, executive, and judicial.

We know there is a close relationship between excellence in journalism and the reporter's need for confidentiality. Outstanding examples are the Pulitzer prize-winning stories by Neil Sheehan of the *New York Times*, bringing the Pentagon Papers to public light; by Jack Anderson making public disclosure of the documents of the National Security Council dealing with India and Pakistan; and by the *Boston Globe's* spotlight team of reporters, who exposed corruption in city government. All of these stories originated with information or documents from confidential sources, and were heavily dependent on those sources. The list goes on and on—other dramatic recent examples include the George Polk Memorial Awards to the Associated Press' Jean Heller for the story on the Tuskegee Syphilis Scandal, to Carl Bernstein and Bob Woodward of the *Washington Post* for their coverage of the Watergate Affair, and to Ron Kessler of the *Washington Post* for his series on hospitals. All these reports saw publication only because sources agreed to reveal information in confidence to able investigating reporters. Confidential sources also were indispensable to Frank Wright of the *Minneapolis Tribune* and James Polk of the *Washington Evening Star News*, who received the Worth Bingham Prize and the Raymond Clapper Memorial Award for stories on campaign contributions.

And those are only the tip of the iceberg—the stories that made national headlines. What about the countless daily investigations of local issues by local reporters?

How many stories will never be born because a source feels insecure in the face of the Supreme Court's decision and the threat of a prosecutor's subpena? A few years ago, the *Wall Street Journal* estimated that 15 percent of its stories were based on confidential information. The *Christian Science Monitor* has predicted that its percentage may go as high as 50 percent.

How much will be lost to the public because CBS News could not assure a welfare mother of anonymity? Because Paul Branzburg's editors became nervous about his continuing series on drug abuse? Because a key source in an official corruption story being developed by a Baton Rouge reporter feared a subpena threat? Because Earl Caldwell's tapes and notes on the Black Panthers were destroyed? Because crucial informers were afraid of being revealed as sources for the *Boston Globe's* spotlight team reports?

The answers will never be known. But the danger is obvious. The less informed we are, the less ability we have to protect ourselves from corruption of government officials, from the unresponsiveness of our institutions, and even from violent crime.

In part, of course, the rash of press subpenas in grand jury and criminal cases in recent months is a symptom of lazy law enforcement. Effective investigative work is a difficult and demanding job. With all the vast resources available to law enforcement agencies today, I see no need whatever to allow a situation to continue in which reporters are forced into the role of unwilling investigators for State prosecutors or local district attorneys, or in which the National Press Building becomes simply the 14th Street annex of the FBI.

In the current debate, nothing is more misleading than the suggestion that the real question should be framed as a choice between combating crime or protecting news sources. The question is not whether we shall have privileged news or unprivileged news, but whether we shall have privileged news or less news. The public, as it watches television, listens to the radio, and reads its magazines and newspapers, will be the greatest loser if the news media are compelled to perform their vital role under the current oppressive atmosphere.

Doctors and patients, attorneys and clients, priests and penitents, husbands and wives—all have protected relationships under the law today. Indeed, it is safe to say that relevant information in criminal proceedings is often lost to prosecutors because of these protections. But society has decided that the need for candor and trust and openness in these relationships is more important than any need that prosecutors may have for the information these privileged groups possess. The same should be true for reporters.

The Constitution recognizes that a free and robust press is central to our liberty, and it is up to Congress to act to keep that guarantee secure.

These principles and objectives have been advanced by Davis Taylor, publisher of the *Boston Globe* and the American Newspaper Publishers' Association. They are presently contained in S. 158, as introduced by Senator Cranston.

In the course of these hearings, I am sure that these principles will be improved and refined, but we must be vigilant to insure they are not weakened. After all, what is at stake is not just the rights of reporters, but the rights of all of us, the right of the American people to know the news—not just the news contained in Government press releases, but all the news.

Thank you.

Senator **Ervin.** Senator Tunney.

Senator **Tunney.** Mr. Chairman, I join Senator Kennedy in expressing the belief that there is no one in the Congress who is better qualified to chair these hearings than are you. You are recognized as a student of constitutional law that has no peer in the Senate, and I feel personally that this is one of the most fundamental constitutional questions to come before the Senate this year.

Senator **Ervin.** If I may interrupt, I want to thank you and Senator Kennedy for your very complimentary remarks. Both of you have always assisted and supported the subcommittee's inquiries regarding the first amendment.

Senator **Tunney.** I believe that these hearings on newsman's privilege legislation are among the most important hearings of the current legislative session. In meeting during these next 2 weeks to explore the issues involved in the general consideration of whether a newsman's shield law should be passed by the Congress, we shall be dealing with one of the most vital matters affecting the public's access to knowledge.

In the recent past, it has become increasingly evident that the Congress must act—promptly and effectively—to create a shield for newsmen who, in the course of their reporting responsibilities, obtain confidential information. Increasingly, information which is essential to the drafting of a complete news story has also appeared of interest to grand juries and courts of law. Newsmen have, in the past several months, been arrested with increasing frequency for refusing to divulge information or the source of information which they obtained in confidence or which they believe deserves protection.

On December 19, 1972, the Washington Bureau chief of the *Los Angeles Times*, John Lawrence, was jailed because he refused to divulge information which had been obtained in confidence by *Times* reporters and which could not have been obtained without a guarantee of confidentiality.

At that time I sent to you, Mr. Chairman, a telegram in which I stated that this raises a fundamental question regarding the constitutional guarantees of a free press and poses a direct threat to the freedom of public officials to talk with the press on a confidential basis. I urged you to join me in expressing profound concern over this dangerous precedent.

The urgency of this issue has not abated since that time. In fact, it has increased. Reporters, television commentators, and other news media representatives have been subjected with increasing frequency to court and legislative subpenas requiring them to testify about matters which the newsman believes are confidential and protected from disclosure. The issues have varied from case to case, but in each of them fundamental constitutional questions have been raised as to the extent to which the press in this country is protected from legislative or judicial control.

About a dozen legislative proposals have been introduced in this Congress which deal with the issues raised by these conflicts. As a member of this Subcommittee on Constitutional Rights, I am going to be very interested in the testimony that we hear over the next week and a half.

I have previously announced my support for an absolute testimonial privilege as to confidential sources. While I am favorably disposed to such a privilege, I shall maintain an open mind during the hearings as to the appropriate contours for the privilege and I shall be receptive to persuasive reasons suggested by the witnesses.

It is important to understand the recent judicial history of the issue and to attempt to delineate those questions which remain both troublesome and unresolved. A number of cases are still in the courts and new cases are still arising in this dynamic and ambiguous area of the law. But those cases which were reported between June and December of 1972, provide an interesting framework from which to evaluate the issues at hand.

If we review the six reported cases which were handed down since the *Branzburg* or *Caldwell* decision of June 1972, and by the end of that year, we can see the extent to which the issue has been resolved judicially. In three of these cases the reporters were not ordered to reveal their sources. In the other three, the reporters were ordered to reveal their sources and were jailed for contempt when they refused to do so.

I have evaluated these cases in my prepared remarks, which I would like to insert in the record in totality.

From that evaluation, we can see that an argument can be offered that a rational standard was set forth by the Supreme Court in the *Branzburg* case, which has been interpreted in such a manner that we are provided with a relatively clear picture, as follows:

(1) We have a set of interests to be balanced.

(2) When the interests which support compelling a reporter to testify are less urgent than in *Branzburg*, the reporter will not be compelled to testify.

(3) When the interests at stake are as urgent or more urgent as were those in *Branzburg*, the reporter wil be compelled to testify, on pain of a contempt citation. Yet, on a close examination of the cases, we can see that no such clearly logical picture emerges. In my analysis, I have indicated that I am convinced that the current balancing test will not yield the most rational results in cases of this nature.

It becomes essential, therefore, for us to attempt to fashion a privilege through Federal legislation—a privilege which will yield more rational results than those which we have seen in the past several months—and one which will protect the vital first amendment interests which are at stake in this volatile and delicate area.

I think, Mr. Chairman, that the recent case history has demonstrated that it is absolutely essential if we are going to have any uniformity in the law throughout the country that some legislation pass this Congress.

Thank you very much.

[Senator Tunney's statement in full follows:]

Mr. Chairman, I believe that these hearings on newsman's privilege legislation are among the most important hearings of the current legislative session. In meeting during these next two weeks to explore the issues involved in the general consideration of whether a newsman's shield law should be passed by the Congress we shall be dealing with one of the most vital matters affecting the public's access to knowledge.

In the recent past, it has become increasingly evident that the Congress must act—promptly and effectively—to create a shield for newsmen who, in the course of their reporting responsibilities, obtain confidential information. Increasingly, information which is essential to the drafting of a complete news story has also appeared of interest to grand juries and courts of law. Newsmen have, in the past several months, been arrested with increasing frequency for refusing to divulge information or the source of information which they obtained in confidence or which they believe deserves protection.

On December 19, 1972, the Washington Bureau Chief of *The Los Angeles Times*, John Lawrence, was jailed because he refused to divulge information which had been obtained in confidence by *Times* reporters and which could not have been obtained without a guarantee of confidentiality.

When I learned later that day that Lawrence had been arrested, I sent an immediate telegram to all members of the California Congressional delegation and to the full membership of the Senate Committee on the Judiciary in which I stated that:

> "This raises a fundamental question regarding the Constitutional guarantees of a free press and poses a direct threat to the freedom of public officials to talk with the press on a confidential basis. I urge you to join me in expressing profound concern over this dangerous precedent."

The urgency of this issue has not abated since that time. In fact, it has increased. Reporters, television commentators, and other news media representatives have been subjected with increasing to court and legislative subpoenas requiring them to testify about matters which the newsman believes are confidential and protected from disclosure. The issues have varied from case to case, but in each of them fundamental constitutional questions have been raised as to the extent to which the press in this country is protected from legislative or judicial control.

More than a dozen legislative proposals have been introduced in this Congress which deal with the issues raised by these conflicts. As a member of this Subcommittee on Constitutional Rights, I shall be deeply involved in the drafting of whatever legislation emerges in this area. Our able Chairman, Senator Ervin, has asked me to chair two sessions of these hearings and I have agreed to do that.

I have previously announced my support for an absolute testimonial privilege as to confidential sources. While I am favorably disposed to such a privilege, I shall maintain an open mind during the hearings as to the appropriate contours for the privilege and I shall be receptive to persuasive reasons suggested by the witnesses.

At the outset of these hearings, I believe that it might be helpful to my colleagues if I were to review briefly the recent judicial history of the issue and delineate those questions which remain both troublesome and unresolved. A number of cases are still in the courts and new cases are still arising in this dynamic and ambiguous area of the law. But those cases which were reported between June and December of 1972 provide an interesting framework from which to evaluate the issues at hand.

Clearly, the most important judicial pronouncement in this area was the landmark Supreme Court decision in the case of *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), which decision also disposed the cases of *In the Matter of Pappas* and *United States* v. *Caldwell*.

Because of the importance of this decision, I believe that it would be helpful if I described in some detail the factual circumstances involved as well as the salient aspects of the opinion of the Court, the important concurring opinion of Mr. Justice Powell (important because, without Mr. Justice Powell's concurrence, the main opinion would have lacked the requisite support to accord it status as an opinion of the Court), and the two dissenting opinions.

Paul Branzburg, a staff reporter for the Louisville, Kentucky, daily newspaper, the *Courier-Journal*, had written an article describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marijuana. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that Branzburg had promised not to reveal the identity of the two hashish makers. Branzburg was subpoenaed by the Jefferson County grand jury, and when he appeared, he refused to identify the persons he had seen making hashish from marihuana. The Kentucky courts ordered Branzburg to answer the questions asked and held that the newsmen's privilege created by Kentucky state statute could not be applied to Branzburg's actions in this matter.

A second case involving Branzburg arose out of a later story written by him which described in detail the use of drugs in Frankfort, Franklin County, Kentucky. The article included a statement that Branzburg had seen some drug users in Frankfort smoking marijuana. The Franklin County grand jury subpoenaed Branzburg "to testify in the matter of violations of statutes concerning use and sale of drugs", 408 U.S. at 669, and Branzburg moved to quash the summons. In this case, although the motion to quash was denied, Branzburg did obtain an order protecting him from revealing "confidential associations, sources or information" but requiring him to . . . "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by (him)." 408 U.S. at 670. Branzburg again sought redress in the Kentucky courts and again the Court of Appeals denied his petition, reaffirming its construction of the Kentucky statute and rejecting Branzburg's claim of a First Amendment privilege.

Accordingly, Branzburg sought and obtained a writ of certiorari to review both of those judgments of the Kentucky Court of Appeals. 402 U.S. 942 (1971).

In the Matter of Paul Pappas arose from circumstances in which Paul Pappas had gained permission to enter a Black Panthers' headquarters on the condition that he not disclose anything he heard or saw there, except an expected police raid that never occurred. He was subpoenaed before a grand jury where he refused to answer any questions about what had occurred inside the headquarters while he was there, asserting a First Amendment privilege to protect confidential informants and their information. The trial judge denied his motion to quash a second summons and the Massachusetts Supreme Judicial Court affirmed. 266 N.E. 2d 297 (1971). The case was decided solely on federal grounds, as no state "newsman's privilege" statute applied in Massachusetts. Pappas was granted a writ of certiorari by the U.S. Supreme Court 402 U.S. 942 (1971).

Earl Caldwell, a reporter for the *New York Times*, had been assigned to cover the Black Panther Party and other black militant groups. He had over a period of time gained the confidence of its members and was, therefore, able to write in-depth articles about the Party. Caldwell was subpoenaed to testify before the grand jury. Caldwell moved to quash the subpoenas arguing that the unlimited scope of the subpoenas and the secret nature of the testimony he would be called upon to give would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." 408 U.S. at 676. The District Court denied Caldwell's motion to quash on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned, 311 F. Supp. 358, 360 (emphasis in original). But, the court did issue a protective order providing that Caldwell "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." 408 U.S. at 678. When Caldwell was directed to appear before the grand jury, he refused and he was cited for contempt. The Ninth Circuit Court of Appeals reversed the contempt order. *Caldwell v. United States*, 434 F. 2d 1081 (C.A. 9, 1970). The Ninth Circuit held that Caldwell was not required to appear before the grand jury. 434 F. 2d 1089. The court concluded that requiring a newsman like Caldwell to testify before the grand jury would deter his informants from communicating with him in the future and would cause the newsman to censor his writings in an effort to avoid being subpoenaed. 434 F. 2d at 1086, 1088. The court held that, absent some showing of "a compelling need of the witness's presence" by the government, that Caldwell was privileged to refuse to testify before a secret meeting of the grand jury because of the potential impact of such an appearance on the flow of news to the public. 434 F. 2d at 1089. The Supreme Court granted the United States' petition for certiorari. 402 U.S. 942 (1971).

The opinion of the Court summarized well the legal claims of Branzburg, Pappas and Caldwell as follows:

"Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or a trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure . . . The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 679–681.

The Court narrowly defined the issue before it as follows:

"The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682.

The Court held that "the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." 408 U.S. at 691.

The Court stated that courts at common law have not recognized "the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury", 408 U.S. at 685, and stressed that the prevailing view in those cases in which a First Amendment privilege was asserted has been that "The First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses". 408 U.S. at 686.

The Court stressed the broad investigative and inquisitive functions of the grand jury, the essential nature of its authority to subpoena witnesses, and the long-standing principle that "the public has a right to every man's evidence", except for those persons protected by a constitutional, common law, or statutory privilege. 408 U.S. at 688.

The Court stressed that, while "a number of States (it referred to 17, there are now 18) have provided newsmen a statutory privilege of varying breadth, the majority have not done so, and none has been provided by federal statute". 408 U.S. at 689

"Until now," stated the Court,

"The only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. . . . (W)e perceive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news-gathering which is said to result from insisting that reporters, like other citizens; respond to relevant questions put to them in the course or a valid grand jury investigation or criminal trial." 408 U.S. at 689–691.

The Court extended the scope of its argument when it stated that:

"It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate otherwise valid criminal laws. Although stealing documents or private wire tapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." 408 U.S. at 691–692.

The Court dismissed the argument that the flow of news would be significantly diminished by compelling reporters to aid the grand jury in a criminal investigation as "speculative", 408 U.S. 693–694, and argued that "reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsmen before a grand jury." 408 U.S. at 694.

Toward the conclusion of its opinion, the Court referred explicitly to Congress' power to enact legislation which would codify a newsman's privilege. The Court stated:

"At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." 408 U.S. at 706.

Several important conclusions, then, were reached by the majority in *Branzburg*. They include the following:

First, it must be stressed that the three defendants, Branzburg, Pappas and Caldwell argued in the *Branzburg* case for a qualified or conditional, rather than for an absolute, testimonial privilege. The Court concluded that the First Amendment did not provide *any* testimonial privilege to reporters, either absolute or conditional, which would exempt the newsman from appearing before the grand jury and furnishing information relevant to the grand jury's task.

Second, the Court purports to limit its holding to the very narrow instance of whether the reporter must "respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682. The opinion does not reach beyond that narrow factual situation.

Third, despite the narrowly-stated holding of the Court, considerable language exists which would lead one to the conclusion that the holding of the Court may have considerably broader application than the above language would suggest. The Court refers to testimony "before the grand jury or at a criminal trial," 400 U.S. at 691 (and similar language at 408 U.S. at 685, 690–1, 693) and (at 20d) of "the obligation of a citizen to appear before a grand jury or at trial . . ., 408 U.S. at 686. Thus, while the holding itself is defined narrowly by the Court, the Court's dicta is in several instances so much broader than the holding itself that it is pregnant with the possibility of subsequent expansion.

Fourth, the majority required that the reporters testify to the grand jury both with regard to confidential sources and confidential information. No distinction was made by the Court between confidential sources and confidential information. The interest of society in investigating and fighting crime outweighed keeping either the source or the information itself confidential.

Fifth, no distinction was made by the Court between material obtained in confidence and material which was not obtained in confidence. However, by requiring reporters to testify as to that material which was obtained in confidence, *a fortiori*, the court would require the testimony of a reporter pertaining to non-confidential communications.

Sixth, no distinction was made between information gathered by a newsman in the course of his duties as reporter or outside the course of his professional duties. In any event, the duty to testify prevailed.

Seventh, in dictum, the Court suggested that no qualified privilege could be adequate to provide the relief that the defendants sought; that, if any privilege is to be fashioned, only an absolute privelege would suffice.

Finally, the Court did make it clear that this was an area in which the Congress might fashion legislation which would apply the protection of the First Amendment to a testimonial privilege.

Justice Powell wrote a brief concurring opinion "to emphasize what seems to me to be the limited nature of the Court's holding". 408 U.S. at 709. Justice Powell stressed that "no harassment of newsmen will be tolerated." 408 U.S. at 709–710. He stated that:

"Indeed if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710.

Thus, Justice Powell stressed in his concurring opinion the narrow holding of the Court. He did not talk in terms of grand juries as well as trials, or in terms of criminal as well as civil proceedings. Rather he talked only in terms of "the obligation of all citizens to give *relevant* testimony with respect to *criminal* conduct." (emphasis added). The opinion of the Court assumes a narrower perspective, then, when one recognizes that Justice Powell's concurrence was necessary to establish a majority on this issue.

Branzburg also included two strong dissenting opinions. The principal dissenting opinion, written by Justice Stewart, who was joined by Justices Brennan and Marshall, complained about "The Court's crabbed view of the First Amendment" which reflected "a disturbing insensitivity to the critical role of an independent press in our society." 408 U.S. at 725.

Mr. Justice Stewart argued that by its holding in *Branzburg*, "The Court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." 408 U.S. at 725.

The Stewart dissent stressed that "the right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source." 408 U.S. at 728. "It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts." 408 U.S. at 729.

"Finally, and most important", warned Mr. Justice Stewart, "when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship'." 408 U.S. at 731.

In responding to the claim of the majority that the deterrent effect of the Court's opinion on First Amendment activity would be merely "speculative", the Stewart dissenters argued that:

"To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies. We can and must accept the evidence developed in the record (of those proceedings) and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships" 408 U.S. at 736.

The dissenters indicated that their assessment of the factors to be balanced is the following:

"[P]osed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively." 408 U.S. at 736–7

And, after weighing the factors involved on each side of the ledger in that balancing system, the Stewart dissent concluded that:

". . . when a reporter is asked to appear before a grand jury and reveal confidence, I would hold that the government must (1) show that there is probable cause to believe that the newsmen has information which is clearly relevant to a specific probable violation of law; . . . (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." 408 U.S. at 743.

Thus, Justices Stewart, Brennan, and Marshall have concluded that the First Amendment provides a testimonial privilege—but a conditional, or qualified, one. If the government can meet the three tests just mentioned, those Justices would compel the newsman to testify before the grand jury.

Justice Stewart also attempted to balance the interests of the First Amendment's guarantee of freedom of the press with the broad investigative functions of the grand jury. But his analysis yielded a result different from Justice White's. In Justice Stewart's balance, the First Amendment interests prevailed. The dissenters accepted the argument that compelling reporters to reveal their sources would severely jeopardize the independence of the press and clearly hamper the news-gathering function, which is vital to the interests of informing the public in a free society.

In a separate dissent, Justice Douglas reached a more sweeping conclusion than did Justice Stewart. He argued for an absolute privilege. He rejected the conclusion that the factors should be balanced. Rather, he contended, the First Amendment provides absolute testimonial protection to reporters in the face of a grand jury subpoena. The Justice stated that:

"It is my view that there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for absent his involvement in a crime, the First Amendment protects him against an appearance before a grant jury and if he is involved in a crime, the Fifth Amendment stands as a barrier." 408 U.S. at 712. He continued by concluding that:

"My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated, the timid, watered-down, emasculated version of the First Amendment which both the Government and the New York Times advances in the case." 408 U.S. at 713.

"Sooner or later", stated Mr. Justice Douglas, "any test which provides less than blanket protection to beliefs and association will be twisted and relaxed so as to provide virtually no protection at all." 408 U.S. at 720.

Thus, the *Branzburg* decision yielded four different judicial interpretations of the status of a First Amendment testimonial privilege for newsmen. Although the state of the federal law is by no means precise, certain conclusions can be drawn from *Branzburg*.

1. An absolute privilege was rejected by the Court.
2. A conditional privilege was rejected by the Court.
3. If a reporter is subpoenaed before a grand jury to testify about facts pertaining to a criminal investigation he is under the same obligations as any other citizen to provide the grand jury with his testimony.
4. In other factual circumstances, a balancing test of some sort will be used whereby the importance of the testimony sought from the reporter, the nature of the proceeding in which the testimony is sought, and the interests of society at stake in that proceeding will be balanced against the reporter's interest—but not privilege—not to testify. As Mr. Justice Powell put it, the issue is "striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

The courts of this land are certainly not strangers to balancing tests, especially in constitutional matters. But the balances are typically weighted very heavily in favor of First Amendment interests, when they are at stake, and do not often leave the state of the law as murky as it has become in this highly charged area.

A number of reporters have been subpoenaed to testify before judicial and legislative proceedings since the ruling in the *Branzburg* case and several reporters are currently facing contempt proceedings for refusing to divulge information which they have obtained in confidence. By the end of the year (1972), at least six courts had handed down written decisions on cases in which the issue of testimonial privilege was raised.

In three of the cases, federal appellate courts (the Second, Eighth, and Ninth Circuits) refused to compel testimony from reporters. Two, however, were civil cases, in which the broad societal interest set forth by the Court in *Branzburg* in investigating criminal activity was plainly inapplicable. *Cervantes v. Time, Inc.* 464 F. 2nd 986 (C.A. 8, 1972), and *Baker v. F. F. Investment Co.*, (C.A. 2, Dec. 7, 1972) —— F. 2d ——. The third case, *Bursey v. United States*, 466 F. 2d 1059 (C.A. 9, 1972) *reh. den.* 466 F. 2d 1090 (C.A. 9, 1972), did involve subpoenas compelling two reporters to testify before the grand jury. But the court held that the press function with which *Branzburg* was concerned was news gathering, while in *Bursey*, the grand jury sought information about the internal management and operations of a newspaper. News-gathering was not involved in *Bursey*. *Branzburg* was, therefore, inapplicable.

Cervantes, *Bursey*, and *Baker* all stress the limited nature of the holding in *Branzburg*, the important First Amendment issues which are at stake in those cases, and the conclusion that, in those circumstances, the First Amendment considerations prevailed.

In *Cervantes*, the court held that it would not "routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation." 464 F. 2d at 993.

The court acknowledged "prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." 464 F. 2d at 992. The court cited *Branzburg*, but noted that "the Court (in *Branzburg*) was not faced with and, therefore, did not address the question (here) whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense." 464 F. 2d at 999.

In *Bursey*, two newspaper reporters who were members of the staff of *The Black Panther* newspaper, were acquitted of contempt charges handed down when they refused to answer certain questions propounded by a federal grand jury. The witnesses refused to answer any questions concerning the internal management and operations of the newspaper and about the identification of persons who worked on the paper.

The *Bursey* court held that:

"Questions about the identity of persons who were responsible for the editorial content and distribution of a newspaper, and pamphlets . . . cut deeply into press freedom." 466 F. 2d at 1084.

The court rejected the government's petition for rehearing, refusing to accept the government contention that *Branzburg* required a contrary holding in *Bursey*. The court stressed that the press function with which the *Branzburg* Court was concerned was news-gathering and that news-gathering was not involved in *Bursey*. 466 F. 2d at 1090.

In *Baker*, the court stressed that the Supreme Court's holding in *Branzburg* indicated that the intense interest in grand jury investigation of crime is one of those "rare overriding and compelling interest(s)" to which First Amendment interests—despite their "preferred position . . . in the pantheon of freedoms"—must yield.

Three other cases since *Branzburg* have, however, yielded the opposite results—at least as regards the fate of the reporters in those cases.

Relying upon *Branzburg*, the Appellate Division of the New Jersey Superior Court held that Peter Bridge, a reporter for the *Newark Evening News* was required to testify before a grand jury investigating an alleged bribe attempt about which Bridge had written a newspaper article. *In the Matter of Bridge*, 128 N.J. Super. 460, 295 A. 2d 3 (1972). The court stressed that "In *Branzburg* the court laid down a broad rule that the First Amendment accords a newspaperman no privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence."

The *Bridge* court further held that (a) Bridge had waived the privilege he was afforded by state law, 295 A. 2d at 6, and (b) that the granting of a privilege in this area is a matter for the legislature and not for the courts to establish, 295 A. 2d at 7.

In *Farr* v. *Superior Court*, 22 Cal. App. 3rd 60 (1971), cert den. — U.S. — (1972), the California Court of Appeals affirmed a contempt citation against a reporter, William Farr, for publishing a story which contained information which had been obtained by violating a court order which barred the divulging of that information At the time he was sentenced for contempt, Farr was not employed as a reporter. The court relied upon that fact in concluding that California Evidence Code, section 1070, the California newsman's privilege statute, was inapplicable to Farr.

Farr acknowledged that he had been provided information by two persons who were bound by a court order against divulging that information. Furthermore, all of the persons (six attorneys) who were bound by that court order not to divulge the information denied that they had given the information to Farr. When Farr refused to identify the persons who had given him the information, he was cited for contempt and jailed.

The Court of Appeals affirmed the contempt sentence, holding that the court's interest in insuring a fair trial outweighed the potential injury of this inquiry on the free flow of information, 22 C.A. 3d at 72–73.

In December, 1972, in *U.S.A.* v. *Liddy*, et al. (D.C. Criminal Case No 1827–72) a Washington, D.C. District Court Judge ordered the Washington Bureau Chief of *The Los Angeles Times* jailed for refusing to produce tape recordings subpoened by the defendant in a criminal case in an effort by the defendant to determine whether those tapes would produce evidence which defendant could use to impeach a key government witness at the forthcoming trial.

The Judge held that no First Amendment privilege sanctions a newspaper's refusal to produce evidentiary material in its possession which is relevant to a criminal trial.

The Court relied heavily upon *Branzburg* to reach its conclusion. It stated: "The present proceeding is linked to a criminal trial as opposed to a grand jury investigation Where *Branzburg* denied a privilege in favor of the public interest in law enforcement, this court denies a privilege in favor of the rights of an accused to a fair trial. The Court believes that while the public has a crucial interest in the investigation and punishment of criminal activity, it must have an even deeper interest in assuring that every defendant receives a fair trial. . . . If impeachment evidence is available, it is critical that the defendants have access to it."

Arguably, then, a rational standard was set forth by *Branzburg*, which has been interpreted in such a manner that we are provided with a relatively clear picture:

(1) We have a set of interests to be balanced.

(2) When the interests which support compelling a reporter to testify are less urgent than in *Branzburg*, the reporter will not be compelled to testify.

(3) When the interests at stake are as urgent or more urgent as were those in *Branzburg*, the reporter will be compelled to testify, on pain of a contempt citation.

By that logic, we can see that civil suits do not involve the same urgent societal issues as grand jury investigations (*Baker* and *Cervantes*) and that information as to the operation of a newspaper is not as urgent as information obtained from news-gathering (*Bursey*).

On the other side of the ledger, the interest of a court in controlling attorneys who practice before it from violating court orders and, thereby, threatening a fair trial is at least as urgent as the interest of society in investigating criminal activity (*Farr*). The sixth amendment right to be confronted by one's accuser in a criminal trial is, similarly, at least as urgent as the societal interest protected by ***Branzburg* (*Liddy In Re: L.A. Times*)**.

Yet, those results do not necessarily follow. In the civil cases, for example, the information sought from the reporters might be more material to the case than information sought from a reporter by a grand jury. And as for the *Bursey* facts, why shouldn't news-gathering activity be protected as vigorously as are details about the operation or organization of a newspaper? News-gathering, after all, is central to the essential role of the press. With regard to the court's interest in the sixth amendment rights of a defendant, would not those rights be adequately protected by thorough cross-examination of the witness on the stand?

Thus, the balance can be struck differently.

Furthermore, it is likely that, wherever the balance is struck, even those interests the courts are attempting to protect will be jeopardized by testimonial compulsion. As Justice Stewart put it in *Branzburg*, "Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice." A number of cases on this issue are still in the courts. I am already convinced, however, that the current balancing test will not yield the most rational results in these cases.

It has been argued that executive guidelines or state laws can adequately protect the rights of the reporter. But the evidence of the past six months indicates that neither safeguard is sufficient. Memo No. 692 of the Department of Justice, which contains its "Guidelines for Subpoenas to the News Media" was in force during the period in which Branzburg, Pappas, Caldwell, Bridge, Farr, and Lawrence were held in contempt of court. And, during that time period, some form of testimonial privilege was on the statute books in at least seventeen (now eighteen) states. (The Bridge and Farr arrests stimulated the New Jersey and California legislatures to act to broaden the privilege in those states).

The following characteristics of those eighteen laws might be noted. To the extent that the privilege is granted, thirteen states have enacted an absolute privilege. Five have enacted a qualified privilege. In those thirteen states which have provided an absolute privilege, only one state (New York) applies the privilege both to the source of information and the information itself. Eleven states apply the privilege to the protection only of sources, and one state (Michigan) applies it only to the information itself (although that law could be interpreted to apply to sources as well). In those five states in which a so-called qualified privilege exists, all five states limit that privilege only to the source of information and not to the information itself. In seventeen states, the privilege can be asserted anywhere—before any type of body or proceeding. But in one state, Michigan, the privilege is only applicable in criminal proceedings. With regard to the issue of which persons are protected by the privilege, the laws all protect "reporters", defined differently by the different statutes. Most of the statutes confine their protection to newspaper, television, or radio reporters and employees. Several states expressly include magazine reporters. None include authors of books within the scope of those who may invoke the privilege. (That so-called "scholar's privilege" has been denied in federal courts. See *United States v Doe*, 460 F. 2nd 328 (C.A. 1, 1972).

While all of the above factors should be helpful to the Congress in attempting to draft appropriate legislation in this area, it is urgent that we understand the limits of existing law and move beyond it to develop federal legislation in this area which responds to the imperatives of the First Amendment, which protects the vital social interests which are involved, and which answers the following questions.

Of course, the threshold question must be whether, in fact, any privilege should be fashioned. In a curious way, however, that question rests upon the resolution of the following questions. For, if the privilege which is fashioned is so broadly qualified that the protection it affords is negligible, the newsman and his sources might be better protected with no privilege. Furthermore, there is always the concern that if Congress can give, Congress can also take away; that, once the First Amendment is tampered with, the precedent might lead to restrictive legislation at a later date in areas which should be protected by the First Amendment. These questions will, obviously, have to be addressed at these hearings.

Assuming, however, that a privilege is to be established by federal legislation, the following additional questions must be answered:

(1) What should be protected by the privilege? Confidential sources? All sources? Confidential unpublished information? All information? Information which has been broadcast?

(2) To the extent that a matter is privileged should the privilege be absolute or qualified? If it is to be qualified, in whole or in part, how should it be qualified?

(3) Who should be given the privilege? Just newspaper, TV, and radio reporters? Authors as well? Publishers? Advertisers? To whom should the privilege extend?

(4) Where can one who holds the privilege assert it? Before grand juries? Criminal trials? Civil Trials? Congressional investigating bodies?

(5) Can (and should, if it can) the federal government legislate a state as well as a federal testimonial privilege? Can a federal privilege protect newsmen in the absence of a state privilege?

(6) What procedural mechanisms and safeguards will attach to the privilege that is created?

As we commence these concerns in this Congress, I have certain views on these factors that I deem most relevant in arriving at our conclusions. Some very basic and elemental assumptions are at stake in this debate. These assumptions go to the heart of the type of society which we profess to be. We profess to be a free people—living in an open society. It has been our view for close to two hundred years that those ideas will prosper which are capable of obtaining acceptance in the marketplace of ideas—that that marketplace will remain free and open to all points of view. Much of our vitality as a nation rests upon that openness.

We have always resisted efforts to constrict the channel through which ideas flow in this nation. We have always proclaimed those freedoms which provide the people with access to thoughts and ideas to be the most important freedoms, those which deserve a privileged position—the state's interest must be "compelling" or "paramount" to justify even an indirect burden on any First Amendment rights.

Today, at least as much as in any other time, we must continue to protect that freedom. We must act to protect it, not because we are thereby protecting reporters but because we are thereby protecting ourself—the American people. For without the ability to know what is happening—without the freedom to obtain and evaluate all points of view, from whatever sources—the foundation of our society is jeopardized.

[illegible] in the next several weeks to listen carefully to the testimony which is [illegible] during these hearings. In light of the legal background which I have presented today, and after hearing that testimony, I hope we in the Congress will [illegible] immediately to answer the unresolved questions in this area in such a way [illegible] we in the Congress most carefully protect the First Amendment freedoms which are at stake.

Senator ERVIN. Senator Gurney.

Senator GURNEY. Thank you, Mr. Chairman.

I agree with the great importance of these hearings and commend our distinguished chairman for scheduling these hearings.

Freedom of press is absolutely essential to a free democratic society like ours.

Therefore, it is not only of utmost importance, but imperative, that Congress continually watch over and safeguard the doctrine of freedom of the press. Certainly of high priority in this whole subject, is the matter of protecting confidentiality of news sources.

However, with a guaranteed right there goes responsibility—responsibility for full and accurate news reporting.

I think that is particularly true today, since public opinion polls show that media presentation of news on public affairs and people in public office has brought both categories, that is, reporters and public officials, to a new low in the public's esteem.

If we are going to enact new legislation to protect freedom of the press, then I believe we need to consider two other areas of legislation.

First, we need to revise our libel law. In 1964 the Supreme Court in *New York Times* v. *Sullivan* held that a public official may not recover damages for the publication of defamatory lies unless there is actual malice proven.

This decision gave the media total license to engage in irresponsible reporting, and indeed in some cases premeditated character assassination without any penalty—because it is virtually impossible to prove malice.

That decision needs correction, and media should be held responsible and liable for damages caused by libelous falsehoods.

Second, it's way past time for media people to have enforceable ethics in their profession. Other professions have had such for a long time.

My suggestion would be a national commission—we might call it "the truth in news commission," of broad representation, including the media. If a public official has been defamed by the publication of false news or half truths, he could bring his case to the Commission and request an investigation.

If such inquiry disclosed that the published matter was false, then the newspaper, radio or TV, as the case may be, would be required to publish their error in a sufficiently prominent fashion.

No other penalty would be imposed.

Yes; freedom of the press must be safeguarded by Congress. It is a precious right which we must protect.

But it is also time to proceed with legislation to enact some responsibility in media, and that is what I suggest.

Thank you, Mr. Chairman. I have a statement which I request be printed in the hearing record.

Also, Mr. Chairman, Senator Hruska was here earlier and had to leave for an Appropriations Committee meeting and he would like to insert a statement of his in the record at this point.

Senator **Ervin**. Let the record show that Senator Gurney's and Senator Hruska's statements will be printed in full in the record at this point.

[The documents referred to follows:]

PREPARED STATEMENT OF SENATOR EDWARD J. GURNEY

Mr. Chairman: Freedom of the press is one of our most cherished and most important civil liberties. The right to print what one pleases, without governmental license or prior restraint, is fundamental to our democratic system, and it is a right which is proudly protected in the document which sets forth the very structure of our government, the Constitution of the United States.

Freedom of the press, however, like the right to free speech, has its limits. Just as one cannot shout "fire!" in a crowded theater, neither can one litter a kindergarten with pornography. Just as the pen can be mightier than the sword as an instrument of preserving the ideals of freedom, it can be a terrible weapon of destruction of individual dignity and reputation when wielded without responsible regard to consequences.

The corollary to a right is duty, and the duty involved in the right to freedom of the press is the responsibility to exercise that right consistently with the rights of others. As we begin these hearings on whether newsmen should be granted a testimonial privilege which has been denied them by the courts, we must explore the fullest ramifications of the proposal. We must examine not only the greater right which is sought, but also we should attempt to define the greatest responsibility which could be expected to accompany it. Therefore we should examine not only proposals for greater press freedom, but also proposals for greater press responsibility. It is to this corollary aspect of freedom of the press that I wish to direct my remarks.

In these hearings we can anticipate hearing a great deal about the value of investigative reporting and the necessity for safeguarding confidentiality in order to ensure that there will be sources of information about corruption or inefficiency, both in and out of government. We must also bear in mind, however, the drawbacks of irresponsible reporting in the name of investigation.

Last summer we witnessed a tragic example of irresponsible reporting and the perils of the secret source. Last July a prominent national columnist printed charges that Senator Thomas Eagleton, then the Democratic vice presidential nominee, had been cited for drunken driving and reckless driving during the 1960's. We all know now that those charges were totally false and the author, in his haste to get a "scoop," never saw the documents upon which his charges were supposedly based. The columnist eventually and reluctantly apologized to Senator Eagleton and retracted his story, but the irreparable harm was already done.

A retraction acknowledges the error, but it does not undo the harm. The reader justifiably can wonder why if the paper was wrong the first time, it is not wrong the second time. The rights of the person defamed are the only ones damaged by such a quandary.

Take another example of irresponsible "investigative" reporting by the same columnist. On July 31, 1972, The *Washington Post* printed this article, supposedly based on information from federal agencies, that most of some 26 tons of opium destroyed in Thailand in March, 1972, by U.S. and Thai officials, was "cheap fodder." In Senate hearings on the world drug traffic on August 14, 1972, officials of the bureau of narcotics and dangerous drugs, the U.S. officials involved in the opium destruction, in sworn testimony complete with photographs and chemical test results, completely disproved this columnist's story. Unfortunately, in this case the columnist has never bothered to admit this mistake.

The effects of "investigative reporting" in the form of uninvestigated allegations and innuendo are painfully obvious. False charges of governmental inefficiency or corruption unnecessarily lessen public confidence in government institutions, and at the same time they unjustifiably malign the public servants in those institutions. As a result, although the quality of persons holding public office has been continually rising, the confidence of the American people in their government has been going down. Good, honest businessmen have entered government service, the press has worked them over, and the public has ended up believing them to be corrupt.

Professors Rotter and Stein, writing in the 1971 Journal of Applied Social Psychology, indicated some of the extent of this problem. Persons holding political office were shown to have a very low rating of public confidence relative to other occupations. By the same token, newspaper columnists and television news reporters also fared poorly, indicating the press itself has much to do to get its own house in order.

At any rate, there are far too many examples of irresponsible press reporting with far too unacceptable a consequence. While many falsehoods by persons posing as "investigative reporters" may be disbelieved, too many people are willing to believe any printed allegation of corruption or inefficiency, however unfounded and unsubstantiated. Because of this, there is a very real danger that a fabricated "secret source" protected by testimonial privilege may become simply a shield for irresponsibility. In considering legislation of this nature, then, we must carefully analyze the likelihood of its abuse.

Unfortunately, for two principal reasons, there is no likelihood that abuses by irresponsible journalists will not occur. First, the journalistic profession has neither a binding code of ethics nor any procedures for enforcing any such ethical structures. This is particularly relevant when considering the question now before us, whether newsmen should have a testimonial privilege akin to those enjoyed by certain other professions, notably attorneys, physicians and clergymen. These other professions have identifiable ethical codes, and the lawyers and doctors, at least, have a definite structure for enforcement of those ethical codes. Also, there are definite restrictions upon entry into these other professions, while anyone who can wield a pen can become a journalist. In the absence of any such standards, or regulations, therefore, just what a newsmen's shield law would cover is most uncertain.

The second reason why press abuses are likely to occur is the virtual absence of legal sanctions against defamation. Beginning in 1964 with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court has developed a federal law of libel and slander which has strictly limited the rights of a public official, public figure, or a private citizen who is involved in an incident of "public interest" to sue for defamation. In the *New York Times* decision, the Supreme court held that the Constitution delimits a State's power to award damages in libel actions brought by public officials against critics of their official conduct. The court held in the case that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he can affirmatively prove that the statement was made with "actual malice", that is with knowledge that it was false or with reckless disregard of whether it was false or not. Obviously, this is difficult to prove.

The result of *New York Times* and its progeny has been a license for libel and irresponsible reporting, not merely when public officials are involved, but also when private citizens happen to get involved in events of "public interest". These events can be as diverse as the behavior of a coach at a basketball game, *Grayson V. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P. 2d 756 (1968), a lawsuit arising out of a stray golf shot, *Sellers V. Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969), a Bishop's attendance at a nightclub performance of a singer of his church's choir, *Washington v. New York News, Inc.*, 37 App. Div. 2d 557, 322 N.Y.S. 2d 896 (1971), or sitting at a restaurant table with alleged mafia leaders, *Wasserman v. Time, Inc.*, 424 F. 2d 920 (D.C. Cir. 1970).

Since we are now considering proposals to give newsmen new and expanded rights, we should also consider suggestions to give them new and greater responsibility. These suggestions should be directed against the two reasons why press abuses are likely to occur, as mentioned above. I would like to suggest for consideration two proposals along these lines.

First, if we are to legislate protections for the journalistic profession, we should consider taking some steps toward formulation of journalistic ethics and standards and toward giving those standards some effect. Since at the same time we should avoid any restrictions upon the right of Americans to print what they please, we should consider creating some form of federal commission to establish a code of ethics for journalists and to investigate claims of unfair press coverage. The complexion of the board would have to be objective, with some members appointed by the President, some by Congress and some by the press. As long as the commission would be simply an examining and fact finding board, with no punitive powers, along the lines of the manner in which unfair election campaign practices are investigated and exposed, any restriction upon freedom of the press would be minimal.

Presumably such a commission should have the power to require the media responsible for false reporting to publish the board's findings and give them prominent display. This would in essence be to require the media to admit the truth. Public acceptance of the board's findings would be a function of the public's belief in the board's fairness and objectivity.

A second possibility would be to return to the original law of defamation by repealing the "actual malice" requirement of *New York Times v. Sullivan*. This could easily be done by amending a newsmen's privilege bill to include language along the lines of the amendment I have attached to this statement.

Such an effort to eliminate the malice requirement of the *New York Times* decision would inevitably pose the question of whether Congress legislatively can limit or negate a constitutional right declared by the Supreme Court. Such a question, understandably, has no hard or fast answer, and since any attempt to remove the malice requirement by legislation would probably be challenged in court, only the courts would be able to make any definitive determination on the point. There is, however, a developing body of law and scholarly comment which indicates Congress does indeed have such a power.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court announced not only that Congress could legislatively decide a constitutional question, which states but the obvious since Congress as well as the Supreme Court is charged with the duty to carry out constitutional mandates, but the Supreme Court also announced in *Katzenbach* that so far as the court was concerned the congressional decision was final and conclusive unless the court would perceive no basis upon which the decision could have been made.

Professor Cox has noted, in Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199, (1971)), that congressional power to dilute or contract constitutional rights under *Katzenbach v. Morgan* may be limited to two classes of cases:

(a) To situations in which the court has formulated a governing principle but the legislative and judicial branches have different perceptions of the conditions to which the principle applies; and (b) to instances in which the court has formulated some corollary to a constitutional command upon a different view of contemporaneous conditions from the legislature's.

It would seem that the constitution provides two principal bases for congressional authority to legislatively eliminate the *New York Times* malice requirement: The commerce clause, and section five of the fourteenth amendment which authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." These are the same two provisions upon which Congress relied for authority to enact title II, the public accomodations section, of the Civil Rights Act of 1964. Use of section 5 of the Fourteenth Amendment primarily involves the equal protection clause of that amendment.

There are at least two arguments supporting such an approach. First, Congress because of its vast fact finding and investigative powers is a more competent institution than the Supreme Court for making certain kinds of decisions about equal protection of the laws, and for that reason the court ought to defer to the judgment of Congress. Second, as the fifth section of the Fourteenth Amendment clearly implies, the authors of the Fourteenth Amendment intended that Congress should play a major role in enforcing it, for which reason again the court ought to defer to the judgment of Congress. See note, *the Nixon busing bill and Congressional power* 81 Yale L. J. 1542, 1566–67 (1972).

As Professor Wright pointed out, however, in Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New* Approach, 46 Tex. L. Rev. 630, 645–46 (1968), there is one difficulty in reliance upon section 5 of the Fourteenth Amendment.

Section 5 authorizes Congress to enforce the provisions of the Fourteenth Amendment, and passing civil rights acts directly responds to this authorization. On the other hand, in creating a Federal cause of action for defamation, Congress would be acting in the First Amendment area, which is under section 5 only indirectly by virtue of the incorporation doctrine. While this distinction is not an insurmountable barrier it does expose again the anomaly that by so enforcing the First Amendment as incorporated in the Fourteenth, we would be curtailing rather than promoting the freedoms of speech and press that the First Amendment was adopted to protect.

For this reason, the best argument in favor of congressional repeal of the *New York Times* malice requirement may lie in the first section of the Fourteenth Amendment. That section forbids the States to deny due process of law to anyone. Again, under section 5 Congress is authorized to enforce the amendment by "appropriate legislation." In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), the Supreme Court held that due process comes into play where a person's good name, reputation, honor or integrity is at stake. Thus by acting to protect the reputation of defamed individuals by eliminating the *New York Times* malice requirement, Congress would be legislating to enhance the due process rights of the people who are defamed.

In this respect, then, what would be occurring would be a "balancing" of different individual interests by the Congress. The goal is not to limit one constitutional right but rather to promote and protect another. Congress would be adjusting the balance between the competing social interests in free press and in freedom from libel and slander. The Congress would be legislating to protect individuals from legally recognized and compensable damage, protected by due process of law, and thus would be acting in the fullest spirit of the enforcement provisions of section 5 of the Fourteenth Amendment. We would not be denying freedom of the press. We would be guaranteeing freedom of the individual. In the process of providing protection for the writer and his source, we should be careful not to deny equal protection to the reader and the person written about.

I believe it is in this last regard that we can best appreciate the competing interests at stake when the newsmen's privilege question is considered. A number of interests and policies are necessarily involved. One interest is that which protects the fullest and freest dissemination of news, the public's "right to know." Another interest, the one which the majority decision last June in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), indicates may be predominant, is the public interest in law enforcement and in ensuring effective grand jury proceedings. A further interest involved is that in protecting individuals from defamation. As Professor Blasi pointed out in his recent testimony before the House subcommittee conducting hearings on newsmen's privilege legislation, a plaintiff who under *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), is required to prove actual malice because the "public interest" is involved, "will almost never be able to meet such a demanding burden if he cannot discover the identity of the defendant's sources for the story."

Two considerations of policy are also affected. One is the necessity for effective investigative reporting. Without some form of protection against disclosures of sources, it is argued, the sources will "dry up," and much evidence of crime or inefficiency may never be brought forward because of the fear of reprisals in the event of disclosure. Clearly we must guard against this. To call upon the press to fight its own battles, and to go to jail for contempt if necessary in the courageous traditions of a free press, is not a wholly satisfactory answer.

A second consideration is one of fairness. Why, it is asked, must reporters who have uncovered news stories be forced to reveal their information, even to law enforcement officials and grand juries, thereby becoming, in effect, governmental agents? Is it not preferable to better provide law enforcement agencies with the talent and equipment necessary to conduct their own investigations without requiring newsmen to provide these agencies with their work product, regardless of any duties which may exist based on morality or the duty of a citizen to help his government? These are difficult questions.

One thing, however, will characterize my approach to the resolution of these questions. What is being sought is a protection and privilege which the law does not, as it stands today, recognize without express legislation. As far as I am concerned, the advocates of a special privilege will be required to demonstrate affirmatively and convincingly that they are entitled to such special treatment. The burden will be on them to show me whether a privilege is really necessary and what qualifications, if any should be included. For my part, I have not been persuaded as yet that a privilege is required, certainly, at least, not an absolute privilege. I believe that considerations of whether the national security may be involved, or whether the privilege is sought to be invoked in defense of a suit for defamation, militate strongly against anything but a qualified privilege, if any there is to be.

As my earlier remarks also should indicate, I am approaching the question of privilege in the larger context of freedom of the press and responsibility of the press. I have made suggestions regarding ethical standards for journalists coupled with a fact finding commission, and I have made some suggestions regarding a possible return to the pre-1964 law of libel through elimination of the malice requirement of *New York Times* v. *Sullivan*. These suggestions have a two-fold purpose.

The first is to notify the press that they should not reasonably expect Congress to pass legislation giving them special privileges, without beginning to accept the responsibility to stand behind what they print. There ought to be some meaningful redress for violation of the civil liberties of innocent people they defame, whether it was malicious or not.

The second purpose is to give the press a warning. As the Justice Department reminded our brothers in the House, legislation to protect the press provides a precedent for legislation to regulate it. Regulation and limitation are but the other side of the same coin, and I think the press needs some tangible reminder of that fact.

Our Founding Fathers gave us some pretty good instructions on how to flip that coin when they gave us the first amendment, which says "Congress shall make *no law* . . . abridging the freedom of speech, or of the press". It will take some very strong persuading to make me believe that we should begin tinkering with a freedom so dear to our people, and so important to our very society.

PREPARED STATEMENT OF SENATOR ROMAN L. HRUSKA

Mr. Chairman, I welcome these hearings on the subject of newsmen's privilege and look forward to receiving a great deal more information on this subject which was considered in the broader framework of the "Free Press" hearings conducted by the subcommittee during the 92nd Congress.

The concept of a free press is, of course, central to our ideal of a free society. In these times, the American people dote on the news as never before. More people want to know more of what is going on, and more are willing to take the time to find out. To satisfy this urge, our citizens must rely in substantial measure on press accounts. Thus, the freedom which our Founding Fathers properly gave to the press takes on added dimensions inconceivable to the drafters of the First Amendment.

In my view, too much of what passes for "news" these days is the product of institutional journalism. The fourth estate must resist the impulse to cut and paste press release, wire service reports and other readily available sources into neat copy, to the exclusion of responsible investigative journalism. To facilitate this goal it is essential that the Federal government and the governments of the states maintain their vigil over their respective laws to ensure that newsmen are not unduly restricted in this effort. Thus, the subject at hand is most deserving of the impressive kind of study the Chairman has laid out for this subcommittee and I am certain that he will conduct it in his usual forthright manner.

The tentative list of witnesses scheduled to appear before the subcommittee is impressive. Their collective contribution to our study will be helpful, I am sure. As government officials, we of the subcommittee must make our contribution as well. Our interest is manyfold. The majority of my constituent mail is motivated by articles in the press. These accounts make it plain to me that often we see the news one way and the media another. However, I do try to abide by the teaching of our beloved former President who suggested that one in public life ought depart the kitchen when the temperature rises too high for his comfort.

At the present time, our focus is directed towards the eight newsmen's privilege proposals which have been introduced this year in the Senate. These, of course, vary substantially in scope. The broadest of them would create an absolute, across the board privilege which would transcend traditional state/federal jurisdictional limitations. The most restricted proposal would create a limited privilege on only the Federal level, authorizing divestiture of clearly relevant information which could not be obtained by alternative means in situations involving the national interest.

This Senator approaches the subject of newsmen's privilege with certain ground rules uppermost in his mind and I take this opportunity to set them forth for the record.

First, the Supreme Court has settled the constitutional issue with respect to the privilege. The *Branzburg* and *Caldwell* opinions of last term are authority for the proposition that the Constitution does not mandate a shield for newsmen. Although some point with interest to the 5–4 split in these decisions, no one questions their vitality. Thus, we are now considering this issue in terms of legislative policy. We are considering whether some type of shield provision is necessary or desirable.

Secondly, our inquiry should be limited to the federal level. Although a number of the bills currently before us would create a privilege which could be asserted on the state level, it is my view that such action would be violative of the Ninth and Tenth Amendments and is inconsistent with principles of good government.

Finally, on the Federal level I am absolutely opposed to an absolute privilege. This is, in my view, an extremely simplistic approach to a very sophisticated problem. It fails to take into account the competing consideration of compulsory-due process and would impose a remedy which is far broader than the alleged wrong which is involved here.

With these ground rules in mind, I look forward to examining all of the proposals for a limited privilege which are confined to the Federal level. The primary issue in this regard, as I see it, is whether the regulations of the Attorney

General are adequate to meet the problems at hand or whether additional action would be warranted.

Counsel, call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness today is Senator Walter F. Mondale from Minnesota.

Senator ERVIN. I want to welcome you to the subcommittee and express our deep appreciation of your willingness to come and give us the benefit of your views on this very crucial subject.

STATEMENT OF HON. WALTER F. MONDALE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator MONDALE. Thank you, Mr. Chairman, for permitting me to testify on what I regard to be one of the most compelling and critical issues to face this Congress and our country since I came to the Congress over 8 years ago.

I am particularly pleased that this issue should come before this subcommittee, and particularly before the chairman, whom I regard as one of the ablest and most thoughtful men in the field of constitutional rights in our Nation today.

Mr. Chairman, I think we all know that without a vigorous and free press, able to probe and correct not only the executive but the Congress, and all other areas of public life, the American public will lose the best eyes and ears they now possess.

What we are really trying to do here is not protect newsmen but far more fundamentally to protect their sacred function in obtaining the information for the public which the public must have in order to make democracy work.

As this committee meets today, there is a real, profound, pervasive, and not imaginary threat to the flow of essential information to American citizens.

I think this is one of the most compelling issues affecting freedom in the history of this country.

Last October, James Reston said in one of his columns what many other reporters have told me, he said:

> Under the new Court orders, even officials who want to talk about the Watergate case or secret campaign funds or General Lavelle's private air war in Vietnam or milk and wheat deals have to recognize now that if they give information to a reporter, no matter how reliable the reporter, he may be hailed into court and offered the choice of disclosing his sources or going to jail.

Then he concluded with a very ominous sentence:

> With laws like these, plus the techniques of publicity and evasion, even the boldest and most honorable men in government are now more scared and cautious than ever in my memory.

Those are the sober words of one of the Nation's most seasoned and experienced reporters and those statements have been repeated in similar form by reporters throughout this country.

The intimidation of the media has taken many forms. It has been Clay Whitehead threatening the industry of broadcast media; it has been the wholesale attempt to eliminate programing hostile to the administration from the public broadcasting system; it has been the harassment of the Washington Post in apparent retaliation for their criticism of the administration. But perhaps most regrettably this intimidation has been the failure of the administration to actively seek protecton for the media in light of the *Branzburg* decision of last summer.

Each of these actions threatens the public ability to learn what we need to know. Together they amount to a wholesale assault on the ability to learn the truth. We face a desperate and immediate need for legislation which fully protects the media from the type of harassment which has become commonplace in recent months, for the jailing and intimidation of newsmen which have occurred since the *Branzburg* decision have put us in serious danger of seeing a wide variety of news sources destroyed.

This process has already begun and I fear it will accelerate if Congress does not act, hopefully in this session.

And if sources of important information are silenced, more than the press will lose for it will mean that the official, authorized version of every aspect of American life will be the only version the American citizen will know.

I might digress here for a moment. I am not one of the oldest people in Washington. I have been around here for about 8 years, and I have noticed that politicians, and I guess I would include myself in that category, rarely put out information which is embarrassing or which detracts from what we are trying to say about ourselves. And that is true of Government agencies. So much of the essential news which the public must know about us, about governmental agencies, about fundamental public policy, becomes known only through what we call leaks, confidential information slipped to newsmen about things which are being kept from the public but which the public should know.

It is the *Branzburg* decision which strikes at this essential form of information. Unless we can do something in this session to shield newsmen from disclosing those sources of information, and to protect them from intimidation and harassment and other forms of coercion, then I think these essential sources of information will be gone from the American public.

If action is not taken to reverse the trend toward the harassment and imprisonment of newsmen, we will find ourselves with only one source of information, the official Government source. We will find ourselves without the information on corruption or waste or inefficiency in Government which is so often provided only from confidential sources. Indeed, in many such instances these sources are themselves Government employees and for them revelation of their identity would mean almost certain dismissal.

Since the *Branzburg* decision was handed down last June, four newsmen have gone to jail, two of them for extended periods of time. In addition, over a dozen other newsmen have been threatened by the courts, prosecutors and legislators to reveal confidential information and sources. These men have been threatened with jail or actually have gone to jail, not because they failed to do their job, but precisely because they did their job well in revealing corruption or breakdowns in law enforcement or abuses in State institutions. These men were jailed for performing a valuable service, an essential service for the American public.

This is the type of injustice which threatens to dry up news sources and muzzle the Nation's news media.

Mr. Justice Stewart noted in his dissent in *Branzburg:*

> The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.

This fear expressed by Mr. Justice Stewart is by no means unique. Two years ago, Dan Rather, CBS News White House reporter, submitted an affidavit in the Ninth Circuit case of *United States* v. *Caldwell*—one of the cases ultimately decided by the June 29 *Branzburg* decision. In it, he referred to a longtime friend and confidential news source:

> This decent, honest citizen, who cares deeply about this country, has now told me that he fears that pressure from the government, enforced by the courts, may lead to violation of confidence, and he is therefore unwilling to continue to communicate with me on the basis of trust which existed between us.

Instances such as this are multiplying since the Supreme Court ruling of last June.

Simply put, we are facing a major crisis in the ability of the press to report the type of news that we need to know, if we are to maintain our status as a democracy in which there is a free and open exchange of ideas. We are face to face with the dangerous situation of reporters and other newsgatherers being unable to uncover waste in government, or the extent of the hard drug traffic, or the attitudes and plans of extremist groups of either the right or the left.

At the same time, government's access to the media grows ever greater. Instant, nationwide communication has enabled a President to reach millions with one version of the truth. But the trends of recent months may in the long run mean that this version of the truth may by default become the entire truth—for the public may simply not be able to learn of the "other side of the facts."

The practical effect of these twin trends is that we are getting more and more of what the Government wants us to know—and less and less of what the public needs to know. We are often fed Government information on a confidential basis, at the same time that our reporters are finding it increasingly difficult to obtain information in confidence which would prove corruption or waste in Government.

Mr. Chairman, in an important address delivered on January 19 in Chapel Hill, N.C., you outlined "four basic questions" which all legislation introduced on this subject must face.

I would like briefly to discuss the means through which the legislation which I and eight other Senators have introduced—S. 637—meets the vital need for protection of the Nation's news media.

First, my legislation creates a qualified protection for the media. I believe that some qualifications in the protection are justified, but only in rare circumstances of exceptional threats to the national security or to human life, and only after the Government—or any other party seeking disclosure—has met a stiff burden of proof.

This showing would require the person seeking divestiture to prove:

First, that there is probable cause to believe that the person from whom disclosure is sought possesses information or source identities relevant to a specified probable violation of law;

Second, that the Federal or State proceeding in question has clear jurisdiction over this probable violation of law;

Third, that the information or source cannot be obtained by alternative means; and

Fourth, that there exists an imminent danger of foreign aggression, espionage, or threat to human life, which cannot be prevented without disclosure.

The person seeking disclosure would be required to show by clear and convincing evidence the existence of all four conditions before divestiture of the protection could be ordered by the court.

These conditions together insure that the only types of information or source identities which the Government or any other party seeking disclosure could obtain would be limited to absolutely essential matters. In particular, condition 2 would prevent unauthorized grand jury "fishing expeditions," and condition 4 by requiring "imminent danger" makes divestiture substantially more difficult than in earlier qualified newsman's shield legislation. In addition, substitution of this type of language for the more general "compelling and overriding national interest" insures that court interpretations will not emasculate the protection which he act is designed to afford.

Second, the legislation which I have introduced applies to both Federal and State proceedings, including judicial, legislative, executive or administrative proceedings.

The great majority of the recent jailings and harrassment of news gatherers since the *Branzburg* decision have resulted from State proceedings. Protection is needed now to insure uniformity among the States, to provide protection for news gatherers in each of the 50 States. There is now a good deal of interest at the State level in protecting newsmen. However, the degree of interest varies from State to State, and the provisions of proposed State statutes also vary widely.

We must enact uniform standards which provide certainty both for the newsmen and—more importantly—for their sources.

In my view, Congress has the authority to legislate for the States on this question, under both the commerce clause and the 1st and 14th amendments.

In order to make any protection we enact meaningfully nationwide, I believe Congress should exercise this authority.

I have a fuller statement which I would ask be included in the record which spells out the constitutional basis for that assertion.

The third question to be resolved is who should be able to claim protection. This is an extremely troublesome matter, but one regarding which Congress has power to make reasonable classifications and to deal with those aspects of the problem it deems proper.

An amendment to my legislation which I intend to submit attempts to deal precisely with this question. Without doubt, our major concern should be avoiding any semblance of licensing of the media, or imposition of substantial restrictions through narrow definitions of who is to be accorded protection. Indeed, should such restrictions or licensing be the end result of any newsman's shield legislation, the cure may be far worse than the disease. On the other hand, we must be careful not to define terms so broadly that every citizen is included.

The fourth and final subject of concern—which I believe is actually the most important in this entire area—is the question of procedure.

It is the opinion of many in the news media—an opinion in which I concur—that the degree of protection offered by any qualified bill increases dramatically in proportion to the procedural difficulty the Government must face in order to obtain divestiture of the protection. Therefore, unlike the qualified shield legislation of the past, my bill makes it clear that no subpena will be issued until the Government has made its showing. This places the burden of going forward entirely on the Government, where this burden belongs.

Mr. Chairman, these four main areas of concern are only some of the many complex variables which newsmen's shield protection must encompass. But while the problems we face in this area are legion, the need for effective protection is urgent.

The interests at stake are no less than the survival of the system of free inquiry and expression as the basis of our democracy.

Justice William O. Douglas has placed these interests in a broad and eloquent perspective.

> Free speech and free press—not spaceships or automobiles—are the important symbols of Western civilization. In material things, the Communist world will in time catch up. But no totalitarian regime can afford free speech and a free press. Ideas are dangerous—the most dangerous in the world because they are haunting and enduring. Those committed to democracy live dangerously for they stand committed never to still a voice in protest or a pen in rebellion.

This is what is at stake in our fight to preserve the press freedoms we have all come to take for granted.

I hope we will act quickly and effectively to insure that these freedoms remain a reality, and not merely a remnant of a past—and much happier—era.

Thank you very much.

Senator ERVIN. I want to commend the excellence of your statement. I have tried to find a sufficient definition of what a newsman is. I have a bill which I am going to introduce today in behalf of Senator Jackson, Senator Pearson and myself. It defines a newsman as being any person who is regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by means of a newspaper, a magazine or a radio or television broadcast.

This definition is designed to answer the arguments of some that a person who is not a bona fide newsman could invoke the privilege. Also it is confined to those media of communications by which the public is informed. I would be glad if you would consider it and give us the benefit of your idea about whether this is a sufficient definition.

Senator MONDALE. I would be glad to respond to that.

As the chairman knows, this will be one of the most difficult tasks which the subcommittee has because I think everyone is anxious to fully and unquestionably defend newsmen, authors, media journalists, and cameramen in the legitimate collection of news.

I think it is important to say that it must be unquestionable. If the rights that we protect here are vague and difficult to define and subject to later court or judicial or legislative interpretation, that is enough to chill the sources, and cause many of them to hesitate to disclose corruption or fraud if they think the true source is going to be disclosed. It may mean his job, it may mean worse, and if he is in any doubt that the law is going to force disclosure of his identity, he may not talk. So we have the dual problem of buttoning down that protection in a way that is doubtlessly secure and, secondly, not extending it so broadly that people can come within it who have no right to protection.

For example, it's been suggested that a criminal might call himself a reporter and say, "I am writing a column now and I can't testify on this because it is privileged. I can't tell you where I got my information."

We want to be sure that statutory protection is designed in terms of an employment relationship or other similarly relevant factors.

Senator Ervin. Your statement indicates that you share my conviction that prosecuting attorneys and law enforcement agencies have issued subpenas for newsmen in what you might call "fishing expeditions". I might state that this bill that I intend to introduce with Senator Pearson and Senator Jackson recognizes that and tries to balance the interest of the public in the prosecution of crime and the interest of the public in knowing what is going on in this country of ours. It provides that a newsman cannot be compelled to testify in any criminal action, criminal proceeding or criminal investigation by a court of the United States or of a grand jury acting under its authority, in respect to any information he has gathered, unless it affirmatively appears that in gathering such information he has acquired an actual personal knowledge which tends to prove or disprove the commission of a crime alleged or crime being investigated.

In other words, the bill would prohibit the subpenaing of any newsman merely because he may have collected some hearsay information about a crime and confines it to situations where he has the personal knowledge.

It would also seem to me, from the cases I have read, that there has been a great abuse of the subpena to compel newsmen to produce memoranda or notes or pictures or negatives or recordings, tapes and other records which they have gathered in the exercise of their profession. This bill provides that newsmen or any person having the custody or control of his memoranda cannot be called upon to produce them unless it affirmatively appears that they contradict or corroborate testimony actually given by a newsman on the basis of his personal knowledge of the commission of a crime.

That will, as I see it, stop these indiscriminate attempts to get the notes and recordings made by newsmen. I think that is essential.

It also provides two methods by which the privilege might be raised. One is that the person who is subpenaed can obey the subpena, and when he goes before the court or the grand jury and is called on to testify, then he can raise the protection that he would be accorded. In lieu of that, he can forthwith move to quash the subpena before the judge of the court. The judge shall hear the motion *in camera* and shall enter an order quashing the subpena unless the party seeking the testimony of the newsman shows affirmatively that the evidence of the newsman is either based on personal knowledge or is admissible for one of these other purposes.

Senator Mondale. You know, it might be convenient if prosecutors, law enforcement officers, could have their work done for them by newsmen. Unfortunately, the price of that would probably be free information. I spent 5 years as State attorney general—a law enforcement officer—and I think there is a tendency to want to do it that way, if you can, but I think we all clearly see the danger inherent in such a process.

And when a newsman is called before a grand jury the mere fact that he is called before it, I think, helps chill news sources in that community, whether he is forced to finally disclose or not. That is why in our bill we place great emphasis on procedure.

We spend a lot of time defining the protection. I think we ought to spend equal time on the procedure, and what we proposed in our bill was that the Government or other plaintiff entitled to bring an action here first must get a judicial determination that the information or the identity that he seeks to obtain is one that comes within the meaning and definitions of law before he can proceed against the reporter.

And the reason for that is that we would like to put the burden on the person who wants to breach the privilege, rather than the other way around. I would like to suggest something along that line to the chairman, because, as you know, just calling a reporter before the grand jury is often enough to blacken his reputation and destroy his capacity to further cover the story.

Senator **Erwin**. I think that was well recognized by the U.S. Court of Appeals in the *Caldwell* case.

Senator **Mondale**. Yes, sir.

Senator **Ervin**. I would certainly agree with you; it is not much value to give the man a right or privilege unless you have the procedure by which that right or privilege can be asserted and protected. Senator Kennedy.

Senator **Kennedy**. Thank you very much, Mr. Chairman. I want to commend Senator Mondale for his statement and his comprehensive testimony. He has obviously given this a great deal of thought and consideration, and we welcome his testimony before the subcommittee.

I was interested in one of the features of your proposal, Senator Mondale, and that was the qualification that you place in terms of imminent danger of foreign aggression or espionage or threat to human life.

I was just wondering in your review of the history of the whole issue whether you felt that in the past situations which did involve the threat to national security or human life or even espionage, that there has been any reluctance on the part of a responsible journalist to come forward with that information and to indicate that information to the appropriation law enforcement authorities which would warrant your qualification on the absolute privilege in this particular area?

Senator **Mondale**. I would have to say that I know of none, but one might occur. Senator Tunney said he was keeping an open mind on the issue of whether it should be an absolute protection or qualified in some way.

I would say I am keeping an open mind in the same direction.

If you read the definition, the exceptions are very, very rare, very precisely defined, and could only be raised in the most extreme circumstances. It amounts to very nearly an absolute privilege because the Government would have the burden on its own to go into court, with the burden upon it, with very clear evidence required, that they must prove that the disclosure of sources is essential because of an imminent danger of foreign aggression, of espionage or the threat to human life, which cannot be prevented without disclosure of the information or source of information.

In other words, it is a very, very limited exception. I might be willing to amend even that. But it seemed to me in those extreme cases where it could be alleged the Nation's security was at stake, or human life was in jeopardy, that we might in those limited cases permit an exception.

But as I say, I am not wedded to that.

Senator **Kennedy**. As you say so eloquently yourself, obviously what you are interested in finding here is an extremely narrow area, and I for one would feel completely comfortable by the way that you might interpret those provisions. You have given the interpretation that is placed, for example, by the administration; the question of national security on the Pentagon Papers—whether to protect a very narrow area, as you might suggest here, we are creating a situation which those who want to further restrict the freedom of the press might use those exceptions to dampen or chill in effect the role of a free press. I can think of, for example, perhaps the reporting on various extremist groups in the United States. We are better off having that information out in the public, the public aware of various activities, and I could see where perhaps there might either be a reluctance with this kind of qualification either by a reporter or certainly by either an informant or an editor to move ahead and publish that story. Again, we can come back to the question whether the public is not better served by having that kind of information out and the American people aware of these kinds of dangers, rather than below the surface, or whether we run into the kind of problems that is suggested by Justice Douglas; that sooner or later any test which provides less than a blanket protection to police associations will be twisted and relaxed so as to provide virtually no protection at all.

Senator **Mondale**. I am very anxious that when we do our job in this Congress, and I hope we do, we do it well and we do it in a way which very clearly and unquestionably protects newsmen in their literally sacred function of gathering news and telling what is going on in American life. That is the whole reason I introduced the bill. We tried to define those exceptions in a very precise, limited way. The burden is on the Government. It is not their definition. They have to go into court and prove that they need the information because there is an imminent danger of foreign aggression or of espionage or there is a threat to human life, which cannot be prevented without disclosure of the information or the source of information that they want.

Now, if the subcommittee, after upon determining this question, decides that that is going to be a loophole, which jeopardizes the function of the newsman. I would be perfectly willing to see it dropped because the essential need is to protect the public.

Senator **Ervin**. I appreciate your response. I think it might be valuable for us in the course of these hearings to look at what the "track record" of the press has been. I have not seen to date the press' abuse of its function which would justify some of the qualifications which you suggest. But I suppose it is debatable.

I think, as you point out, it is something that we can develop in the course of these hearings.

Finally, Senator Mondale, I notice that you are submitting with your testimony a detailed justification of the constitutionality of Federal legislation which I think will be helpful and useful to us.

Is it your feeling and impression that unless we have at least some Federal statute here that we are going to run into a situation where different State jurisdictions might have different laws with different interpretations, which might pose troublesome kinds of problems for the reporter in one State versus another. An informant will be wondering whether he is going to be under the State law or the Federal law when he gives information. Not only do we have the authority in the 1st and 14th amendments, the Commerce clause, a necessary and proper clause, but it is important for us to move if we are really going to eliminate the potentiality for all kinds of ambiguities in this area.

Senator **Mondale**. I believe this is very important. I originally thought of legislation simply applying to the Federal level but then it became quickly apparent that more and more of the instances of reporters being jailed are occurring at the State and local level than at the Federal level, although it is occurring at all levels. I can't think of any national interest that is more important than the free flow of information.

We are seeing some impressive efforts at the State level. For example the Governor of my own State issued a special message calling for a State newsman's shield bill. Yet the variety of such legislation that could occur at the State level, the number of States that might not act, and the months and years that might take for them to act, have convinced me that we need a Federal statute which establishes standards in Federal and State and local tribunals.

If we don't do that, this will be another great area of vagueness. If a reporter can't be hauled before a Federal grand jury, a crafty local prosecutor or local legislator who is offended by what is going on might very easily find a State point of jurisdiction and haul him before another grand jury.

As I said earlier, I don't think that legislation whic his vague does us any good, because what we are talking about here is not protecting a newsman; we are talking about encouraging people with vital information, the public news, to feel free that if they tell a reporter they will be free from intimidation and harrassment. If it is vague, no reporter can tell a source that that is the case.

We have had instances which show the need for this protection. In one case a welfare mother who had evaded and violated welfare laws had agreed to talk to one of the network newsmen, providing her name was kept confidential.

This is something the public ought to know because the public money is involved in this.

When she was approached she said, "Can I be sure no one will know my name?"

And the reporter, in fairness to her, said, "Let me check and I will call you back."

He called her back and said, "I must tell you, in all honesty, we cannot guarantee you that we can protect your identity."

"Well," she said, "I am not going to talk."

And this apparently is going on through all Government. When you have people as distinguished as Dan Rather and James Reston and many other top reporters, saying they have never seen people clamming up the way they are now and refusing to talk, it means that all through Government, all through American life, sources are afraid to tell what the public needs to know.

And unless we can deal with this problem clearly and unquestionably, I don't think we have dealt with it at all.

Senator **Kennedy**. Just a couple of final points:

I suppose the law is quite clear on the whole question of libel now, as I think Senator Gurney outlined briefly in his opening comments. If we are going to charge that, that is a function of legislative action. But I suppose if we put into any legislation the exception of libel, which has been suggested, would you be concerned that there might be those who would in effect get into a court of law on the question of libel and reach on into a reporter's sources on the allegation of libel and that this may very well provide sort of another rule which would be sufficiently expanded or broadened to again threaten the information?

Senator **Mondale**. Anyone can bring a libel action, and if you have a libel exception, they can bring it on the most specious grounds, hold depositions, force disclosure of identities, and drop the case.

So I think if you have a libel exception in there, you have passed a bill and then driven such a big loophole in it that you have nullified its effect.

I asked a prominent attorney from Chicago, A. Daniel Feldman, who has extensive experience in libel matters, whether he thought a newsman's shield bill would fundamentally adversely affect what is left of the libel laws, and he said, "No." I would be glad to submit for the record the memorandum which I received from him on this subject.

Senator **Kennedy**. Thank you.

I would hope as you had your exchange with the chairman that you give us the benefit of a judgment about who is a newsman. I think this is going to be one of the real challenging questions.

There have been a number of different suggestions. But obviously, again, you have given us some help already in your testimony here this morning, but I think to the extent that you have given thought to this question, and you could give us the basis of your judgment, I think that would be of great value.

I can tell your own thought process in this consideration has gone into it and it is going to be one of the most troublesome areas and we appreciate your help.

Senator **Mondale**. We are anxious in the proposal that we have introduced to define the bill broadly enough to include all legitimate reporter inquiry, whether printed or media, but also including authors and opinion writers. I think it is important that we cover the whole area.

Senator **Kennedy**. What about scholars?

Senator **Mondale**. That is one of the toughest parts of this issue, and I would hope that the committee would give that question very serious consideration.

I recall when the Senator from Massachusetts and I inquired of the administration whether we were sending arms to Pakistan while Pakistan and Bangladesh were engaged in brutal civil war. The official answer on four separate occasions was: No, we are not sending any arms to Pakistan.

On four separate occasions we were told specifically, clearly, and unequivocally that we need have no fears. I remember saying publicly I was glad to see the administration was staying out of this.

Then an enterprising reporter, based on a leak, went up to the New York Harbor and found three ships being loaded with arms to Pakistan.

Now, that is the type of deceit we are dealing with here. This was a bipartisan letter, I think some 17 Senators wrote the State Department. Yet the tendency of Government is to cover up and even to deceive itself, and to try to avoid embarrassments. This is precisely why we need a searching free press and media there to challenge them and to make the facts known to the public.

Senator **Kennedy**. I want to thank you very much for your comments.

Senator **Ervin**. Senator Tunney.

Senator **Tunney**. Thank you, Mr. Chairman. Most of the questions and issues that I had, you covered.

I would like to compliment Senator Mondale on his testimony. I think it has been very excellent.

I perceive that the qualification that you would have in your legislation is similar to the qualification expressed in a dissenting opinion by Justices Stewart, Brennan, and Marshall, in the *Branzburg* case, that under certain circumstances the tangible need to know the truth about the criminal activity on libelous matter or national security is more important than the tangible but theoretical chilling effect on sources.

Did you intend to have your qualification appear to be the same as expressed in the dissenting opinion?

Senator **Mondale**. In my original proposal, we did draw on that language, and then upon reflection we decided it was too vague. The language in the opinion was "compelling and overriding national interest," which is a very general standard. We changed that so that procedurally, the Government must go get an approval from an independent court in order to issue a subpena, with the burden on them. Second, the standard must be among other things, that there exists an imminent danger of foreign aggression, of espionage or of a threat to human life, which cannot be prevented without disclosure of the information or source of information.

We got much more specific, on a far more limited exception, than did the opinion to which you make reference.

Senator **Tunney**. One of the things that has disturbed me about the Government's policies of classifying information is that whereas a person who is working down in the lower echelon in the Federal bureaucracy could be prosecuted for revealing information in a classified document, if the head of the Department or the President of the United States reveals that very same information, it is accepted simply as giving the public access to additional knowledge and information about what is going on.

I recall at the time of the *Caldwell* decision, reporters were submitting affidavits saying that they had heard Presidents reveal information that was classified up until the time it was revealed, and that it was almost always done for the purposes of exploiting the President's point of view and trying to convince the public that his point of view was correct. Do you have any thoughts on that as it relates to this issue?

Senator MONDALE. I don't know how you protect or prevent a top echelon executive, from the President on down, from disclosing information which his own classification system prohibits, or of denying him the right to punish someone else for doing what he just did. There may be some way of getting at that. I wish there were, but none comes to mind.

I think one thing is clear, and that is that public officers in the lower levels of Government who reveal fundamental facts or criticisms of Government, are often punished in most dramatic ways.

Mr. Fitzgerald told the Joint Economic Committee that the C5A airplane cost $2 billion more than the Government said it did. He lost his job. They first sent him to Thailand to inspect bowling alleys, when he had just received a letter of commendation. I am told he was one of the most gifted accountants and contract appraisers in the Air Force.

When Sergeant Lonnie Franks said that General Lavelle had a private air war going on in Southeast Asia, he went from a trusted staff position to a coffee shop, and was then removed even from there on the grounds that he had personality problems.

When Gordon Rule of the Navy, an old trusted employee, came up on the Hill and said some unflattering things about some of the contract procedures over there, he, too, was transferred to a meaningless job.

That is the situation, I don't mean it in a partisan sense, because I think it happens under too many governments and under both political parties. We don't like to have the truth come out; we would like to have it our way, paint our own canvas, have one official version and that is what the people have to take. That is why we need a vital news source, and that is why we need to protect the right of insiders to leak information that the public needs.

Senator TUNNEY. That is my feeling too. I feel very strongly that if these at the very top can manage the leaks so that their point of view is expressed publicly, in order to pick up public support for their point of view, why shouldn't we protect a newsman's source if that source is a person who is giving to the public the truth, irrespective of the fact that at times it may be very embarrassing to the administration. Thank you.

Senator MONDALE. Any administration?

Senator TUNNEY. Any administration. As a matter of fact, in the *Caldwell* case, they were talking about Democratic Presidents leaking information.

Senator MONDALE. That's right.

Senator KENNEDY [presiding]. Senator Gurney.

Senator GURNEY. Just one question on the libel subject. It isn't your thought if a public official has been libeled, that he shouldn't be able to sue for libel and recover if the libel is there?

Senator MONDALE. Yes; if I understood your opening remarks, you were talking about the possibility of changing the Federal libel law as it affects the right to sue as a distinct issue from the newsman shield legislation?

I am submitting for the record a brief prepared by a very distinguished libel attorney, A. Daniel Feldman, in which he says he doesn't think a newsman's shield bill will really affect the question that you raised. It is a separate issue, and I will submit that for the record.

[The document referred to is printed in the appendix.]

Senator MONDALE. What I fear, Senator Gurney, is that if you make a libel exception to the shield law, as you know, under the rules of civil procedure, anybody can start an action, though, under rule 11, there are certain professional restrictions that are very loose. You can start an action and then the authority to take depositions and interrogatory follows under the rule and you can force disclosure of these sources and information in that way and then drop the lawsuit.

So if you want to assure people of confidentiality of sources, it seems to me under the shield legislation you can't have that exempt. But that doesn't deal with your question.

Senator GURNEY. No; I would agree they are two separate things, although I do think the responsibility for reporting is all wrapped up in what we are talking about now. I think all of us in public office have had numerous examples in our own personal lives as well as those of our colleagues where we know there are stories, "sources say Senator Mondale and Senator Gurney and Senator Kennedy did thus and so," and we know we never did any such thing. In fact we may not have been there.

These are points I was talking about in the opening statement. Take a look at some of those problems along with this because they are wrapped up in the question of protecting news sources.

Thank you.

Senator MONDALE. Just one point, if I might: I don't believe that there is much that we could or should do about responsible reporting. My personal opinion is that the media are quite responsible, though I have seen some irresponsibility. I think the most responsible, balanced, seasoned reporters and columnists and newspapers and news outlets over the long run tend to gain the most confidence and respect. Irresponsible ones do not and I would certainly hate to set up or serve on a political body that passed on the responsibility of newsmen.

I think that we should depend upon the forces of truth rather than political forces to bear upon them. But I give that answer with a little reluctance because I don't know exactly what proposal you have in mind.

Senator GURNEY. I would make a comment on that. How can you get to the truth, so-called, if you have a situation, as is the case today, in most major news centers, where both the morning and afternoon papers have the same owners?

Senator MONDALE. That is why I said I was reluctant. If you are getting at monopoly of news ownership, I think that is a very good issue to get into.

Senator GURNEY. Well, this is another issue all wrapped up in what we are discussing.

We do have a monopoly of news ownership today, in the newspaper field and in many other areas of news reporting. Where there is a monopoly you can't get at the truth because there isn't any competing news organ to get at it, at least in the newspaper field. Therefore, I think the question of responsibility again arises and ought to be dealt with. There seems to be no way of patrolling the truth of what is written about a public official or for that matter somebody who isn't a public official, because he is just as important as those who hold public office. I would tend to agree with you that if you can get the truth the public is able to judge the truth by itself, as they are in political campaigns, where both candidates are saying what they believe in and also exactly what is erroneous in what the other person says. It is so often the case that there is no way of getting at the truth really. We have numerous instances where not even retractions are printed, even though the media knows that error was made.

So I do think that perhaps we could look into the responsibility aspect.

Senator MONDALE. Yes.

Senator KENNEDY. Thank you very much.

Senator Cranston, we welcome you. Our distinguished chairman has been called out of the hearing room for just a moment but I know he wanted to extend a warm welcome to you. You have provided great leadership in this whole area and you have given a great deal of consideration and we are looking forward to your comments.

STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator CRANSTON. Thank you very much, Mr. Chairman. I am delighted to be with you and the members of the committee. I am privileged to be here today to testify on the need for congressional action to protect news sources and information obtained by the media against compulsory disclosure in Federal and State proceedings. On January 4, I introduced S. 158 on behalf of the American Newspaper Publishers Association. That bill embodies the principles and objectives which, I believe, are indispensable elements of the legislation which your subcommittee and the full Judiciary Committee should report to the Senate, and which the Congress should enact. Nothing less than the freedom of the press in our society is at stake.

For a society to be truly free it must have a press that is truly free. The first amendment is not a piece of special interest legislation for the news industries. It is rather a governmental guarantee to a free people without which they could not remain free for long.

One of the fundamental services that a free press renders to a free people is to watchdog the various levels of government, the officialdom and the bureaucracy who handle the people's money and who wield awesome powers over people's lives and freedoms. The press in America has amply lived up to that responsibility.

Hardly a day passes without some evidence of public or private hanky-panky or worse being exposed by the press somewhere in our country. These stories are based in large part on confidential tipsters who confirm what the reporter has learned from other sources or who lead him to new revelations. Without those leads many of those stories might never have been written. And many of the criminal indictments and convictions that followed those stories might never have happened.

As a former correspondent for the old International News Service, I know, and most newsmen agree with me, that confidential sources are indispensible. But the U.S. Supreme Court last June 29 ruled in effect that the press in our country does not possess an inherent first amendment right to withhold confidential information, and that a reporter may therefore be jailed if he refuses to disclose information demanded by a court. But Justice Byron White, who wrote the 5 to 4 majority opinion, invited congressional response. He pointed out that notwithstanding the Court's feeling in the matter, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable.

But by no means does everyone favor congressional action at this time, if ever.

The administration, though reluctantly willing to accept some qualified bill, thinks the press should put its trust totally in the self-restraint of the Justice Department and rely on the Attorney General's guidelines. Those are the guidelines which the Attorney General's Office imposed on itself in August 1970 in response to a growing concern of the news media.

That concern arose from a spate of Federal grand jury subpenas earlier that year. They included subpenas served on *Time*, *Life*, and *Newsweek;* the four major newspapers in Chicago, and the now famous subpena for Earl Caldwell of the *New York Times*, which led to last June's landmark decision. During 1969–70, the networks were served more than 150 subpenas.

In my opinion, the Attorney General's guidelines are a rather shaky staff for an independent press to rely on. True, they restrict somewhat the use of the subpena power against newsmen—but only somewhat. And only for as long as any particular Attorney General wishes to keep them in effect. Worse yet, the guidelines implicitly legitimize governmental powers over a free press which, in my view, the Government should not possess.

Much more credible to me is the fear expressed by some members of the press that looking to the legislature for protection is a risky business. They accurately note that "What Congress gives, Congress can take away." These newsmen prefer the path recommended by one publication that warned that the press can "only put its trust in the first amendment pure and clear, and plug away at getting the whole truth and nothing but the truth."

Unfortunately, the first amendment became considerably less "pure and clear" for press purposes, thanks first to the *Caldwell* decision, and then to the Court's refusals to review the imprisonment of Bill Farr in California, and Peter Bridge in New Jersey. So despite the opposition of some members of the press to congressional action, it is now apparent that unless Congress does act, strongly and clearly, to fill the first amendment void created by the *Caldwell* decision, our press freedoms will be still more seriously eroded as lower courts apply the *Caldwell* holdings in more and more cases.

Some newsmen believe that the best way to get the Government and the courts to back down is for more reporters to choose jail rather than violate a confidence. To quote their reasoning: "They can't put us all in jail. And besides, it will prove to informants that reporters won't break their word."

Most newsmen would agree, however, that the sight of a newsman being carted off to jail is more likely to shake up a news source than reassure him. And it's less than a sure bet that Government prosecutors are going to be deterred even by a succession of sacrificial lions behind bars.

I agree with attorneys for the *Washington Post* and *Newsweek* who hold that:

> The preservation of an institution as important to our form of government as a free press should not and must not depend upon the willingness of newsmen to go to jail.

The current debate for the most part has centered not on whether Congress should pass protective legislation, but rather on what should be the nature and sweep of that legislation.

Who and what should be protected? Under what conditions? Indeed, should there be any limitations, or should the ban against compulsory disclosure of confidential news sources and information be total and unqualified?

I believe that a broadly embracing and absolute protection is needed to insure that the public gets the information it must have in a democratic society. It is my view that Congress' aim should be to protect, explicitly by statute, all of the newsgathering rights which many people had all along assumed were implicit in the first amendment—until the Court told us otherwise.

Though some people talk in terms of a newsman's privilege, that is a misnomer. The newsman merely exercises the privilege on behalf of the public. The public itself is the beneficiary. Congress must act to protect the public, not merely the newsman and his source. The press in America must be able to protect its sources so it can continue to expose corruption and lawlessness in and out of government, in high places and low.

Intelligent self-government requires a vigorous, robust press that will develop confidential leads and follow them up. It demands fiercely independent, unintimidated news media that probe and investigate, question and criticize, and so shed the daylight of public exposure on every shaded or shady area of public life.

It also demands a press that is more than an uncritical conduit for public pronouncements. Today's in-depth, interpretive reporters make frequent use of confidential information to help them verify and evaluate the on-the-record news they get from official sources. Much that is handed out as news these days is superficial, sometimes deliberately misleading, and almost always self-serving.

If a self-governing people are to govern themselves wisely and well, their Government must encourage the fullest possible freedom for them to speak their minds; the Government should encourage the people's freest possible access to information and opinion by which they may enlighten their minds. The two are inseparable and interdependent.

But what would happen to investigative reporting, what would happen to advances toward truth and probity in public life which result from fearless investigative reporting, if newsmen could not guarantee confidentiality to their news sources?

It is generally recognized that these sources would dry up. That drying up constitutes a danger to our free press and, more importantly, a danger to our free society. Without an ironclad assurance of anonymity, many people with vital information that should come to public attention simply won't talk.

That's not surprising. When public or private power is abused, it is often abused secretly. As a police department often must depend on a tip to solve a crime, so an investigative reporter often must depend on a knowledgeable, inside informant to be able to discover abuses of power and bring them to public attention. But informants who fear for their jobs—and sometimes for the lives—rarely divulge incriminating information unless they feel sure that their identity will be kept secret.

Robert Fichenberg, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, warns that—

> It would take only a few instances of forced disclosure at the Federal level to set in motion a nationwide chain reaction of timidity and reluctance among potential sources.

That "chain reaction of timidity" may already be underway. Brit Hume cataloged in a *New York Times* article last December, instance after instance of inside-the-Government informants choking up, if not drying up, for him and other newsmen. This is a case of no news being bad news. What we don't know will hurt us.

Significantly, Mr. Justice White's opinion for the Court in the *Caldwell* case projected just the opposite result of a failure to protect news sources. He said:

> Reliance by the press on confidential informants does not mean that all sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. . . . There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters.

In fact, the experience of the last 7 months indicates Justice White was not correct on the facts of the situation. I think that is a significant development. Through investigations such as these hearings, Congress can discover the truth as to whether news sources are indeed drying up. And based on independent, comprehensive findings, Congress can then take appropriate legislative action.

The Court's opinion also makes much of the point that though there has never been a Supreme Court holding that news sources were protected, sources were not reluctant to come forward with confidential information in the past. This, I must say respectfully, misses the point. Most of the reporters, broadcasters, publishers, and private citizens with whom I have talked had generally assumed prior to the *Caldwell* decision that such a constitutional protection was implicit in the first amendment freedom of the press clause. It was the Court's holding to the contrary which opened wide a door which had hitherto been widely understood to have been locked.

Newsgathering is an obvious prerequisite to news publication or broadcast. Consequently, governmental action that has the effect of restricting newsgathering by drying up news sources is, in a real sense, a form of prior restraint on the press—a practice most Americans look upon with abhorrence.

Informants will be encouraged to talk to the press only if the law that Congress designs to protect them against involuntary disclosure is "as broad as possible and simple enough for anyone to understand" (to quote *Post-Newsweek* lawyers again). For if the law is neither broad nor easy to understand it will likely turn off rather than encourage news sources. That, I'm afraid, will be the result if any of the qualifications proposed in other bills now before the subcommittee are enacted into law.

Read some of the qualifications that have been proposed, singly or in combination and consider: How many potential informants will be eager to talk to the press once they realize that the reporter may be compelled to testify if there is "probable cause" to believe that the information they give him is "clearly relevant" to a suspected crime? Or that the evidence is "unavailable" or "not readily accessible elsewhere?" Or that the information must be exposed in open court "to prevent a miscarriage of justice?" Or because of "compelling and overriding national interest" or for reasons of "national security?"

We all know that the Government of the United States can invoke national security almost any time it wants to. And in most cases makes it stick. Is a loophole like "national security" likely to reassure confidential news sources that they could talk with impunity? Would a member of an espionage ring tell what he knows to a newsman if the reporter is compelled to identify him to the authorities? Hardly. And as a result of his silence, law enforcement officers themselves will not have the benefit of the information he might otherwise have disclosed.

All such qualifications, though intended to protect the public, are in fact self-defeating. They would hurt, not help, the public. Take as another example a proposed exception that would deprive the news source of anonymity where there is "a threat to human life." There is such a qualification in the bill introduced by Senator Mondale who preceded me this morning. If the identity of a member of the Mafia is ever revealed in court because he tipped off a reporter to a planned murder, it will probably be the last time that a member of the Mafia—or anyone else who doesn't want to be "fingered"—tips off a reporter to a murder.

Moreover, what constitutes a threat to human life? Is bad meat sold to the public a threat to human life? Last July, William Avery, news director of channel 13, in Springfield, Mo., wrote to tell me about substandard meat processing plants in the State which the station's reporters had learned about through confidential sources. The station broadcast the story.

If the "threat to human life" exception applied in this case, as well it might, then the station's newsmen could be compelled to identify the source of their story. With that precedent, how many others would dare tell a newsman about unwholesome conditions in a food processing plant in the future, particularly if somebody working in the news plant didn't want his job jeopardized.

Thus an exception probably meant to apply to cases where killings may be involved could easily spill over to cover instances of bad food which might cause illness or death. Similarly, this in turn could extend to product safety of any kind: automobiles, flammable clothes, or unsafe power tools used in the home. A worker in a factory might not dare reveal to a newsman that the powersaws his plant produces are defective for fear that his identity would be revealed in court and he'd lose his job.

The worse the crime we want to prevent or to solve—kidnapping, murder, political assassination, espionage—the more important it is that Congress produce legislation that will encourage tipsters to tell the press what they know about these crimes. To deny these sources protection again disclosure will surely mean that these sources will not risk their necks by talking. And the information we need the most—tipoffs to kidnapping or murder or political assassination or espionage—is the very information we will no longer receive.

Most people won't read the law, of course. But they will read of reporters and their informants caught in its web. When silence is so much safer, few potential informants will be willing to take their chances of emerging unscathed from the vague and uncertain legal maze created by a qualified protection.

A number of pending bills propose a total exception for defamation cases. I believe that such a blanket libel exception would create so huge a loophole as to destroy the very protection we are seeking to create.

The rulings in the *New York Times* and *Rosenbloom* cases require plaintiffs in "public figure" or "public interest" defamation suits to prove malice on the part of the news media when the media has disclosed alleged corruption or wrongdoing. As a result, it is now extremely difficult for the "public" plaintiff to win a defamation award, or even to resist summary dismissal of his case.

But a blanket libel exception in these kinds of cases would in effect give "public figures" a concrete, albeit illegitimate reason to bring libel actions against the media. Though the public official would stand little chance of winning his suit, he would be able to force the newsman to disclose the confidential news source who "blew the whistle" on him.

A blanket libel exception clearly offers far too great an opportunity for abuse.

I also want to focus briefly on the need for a Federal statute which extends to all non-Federal proceedings. In the course of these hearings, you will hear from eminent constitutional scholars who can best present the arguments for the authority of the Federal Government to enact preemptive legislation in this field. I will leave the 14th amendment and commerce clause arguments in their able hands.

What I wish to emphasize is the practical need for uniformity in this area to preserve the public's need to know. A Federal statute applying only to Federal proceedings offers little assurance to a potential news source who knows that the newsman can be subpenaed and compelled to reveal in a State or local proceeding the informer's identity or certain information he has given in confidence. I do not believe we can afford the luxury of waiting for each of the remaining 31 States to act in this field. Nor can we expect them to enact a uniform law any more than the 19 States which already have a wide variety of news protection legislation.

For the channels of confidential communications to be effectively reopened, newsmen and their sources must know with reasonable certainty what the rules are as to a subpena issuing under either State or Federal authority. It is also important to stress that news flow clearly is a national occurrence. And that we in Washington, D.C., for example, need to have the fruits of the confidential relationships—and the information flowing from such sources—which the press may have established in San Diego, Chicago, Philadelphia, or wherever. News, and the public's need to get the news, knows no State boundaries.

An attorney cannot violate the canons of ethics and break a confidence with his client even to prevent the conviction of an innocent man or to disclose a breach in national security. Yet we don't hear demands that the attorney-client privilege be "qualified" to compel a lawyer to testify when he has that kind of information. Nor do we hear that either our system of justice or the survival of our Nation is in jeopardy because that privilege isn't qualified.

A doctor also cannot be compelled to break a confidence with his patient. But it is accepted that he will violate his Hippocratic Oath and disclose confidential information about his patient if, in his professional judgment, disclosure is necessary for the public safety or to protect his patient's life.

A reporter must also have this double set of freedoms; freedom from compulsion and freedom to follow the dictates of his conscience, his common sense, his loyalty to his country and, most cogently, freedom to exercise his professional judgment. The reporter alone is competent to determine if breaking his pledge of confidentiality in a particular case will harm future relations with his sources and so diminish or destroy the services he can continue to render the public as an investigative reporter.

Many people consider the press a kind of unofficial ombudsman of our constitutional system. Many have learned that it is sometimes necessary to get press publicity as a prod to those in authority to take action against wrongdoers. In most such cases, the only alternative to public disclosure is continued coverup. That is perhaps why prosecutors in States with so-called newsmen's shield laws told a New York Law Revision Commission that those statutes actually help them in law enforcement. A number of State attorney generals and other law enforcement officials agree completely.

I believe that an unfettered press is basic for law and order and justice in a free society. I am equally convinced that an unfettered press is basic for a criminal defendant to have the protections that the Founding Fathers envisioned when they insisted on his constitutional right to a "public trial."

I believe that a defendant has more to fear from secrecy in his trial proceedings than from press coverage, more to fear from a star chamber than from a five-star edition.

First is literally first, constitution-wise. The Court has time and again ruled that first amendment rights like the right of free speech and free press enjoy preferred status. First amendment rights must be given greater weight whenever they come into conflict with other Bill of Rights guarantees.

That's simple logic, as far as I'm concerned. For if first amendment rights did not exist, most of the rights enumerated in the other nine amendments would be empty rights; they would offer little consolation to a people intellectually enslaved.

If newsmen are compelled to testify about criminal information they may possess, most if not all of them will soon cease to be recipients of criminal information and so, having nothing to testify about, will no longer be subpenaed. That may be one way of resolving the current controversy, but it is not the way I recommend in the public interest, or in the interest of law and order and justice.

Many undesirable side effects also will occur if newsmen's files, notes and "work product" are available upon subpena to prosecutors, investigators and others.

People who normally deal with the press openly, in a straightforward manner will become more guarded and more reticent once they realize that something they say may involve them in a criminal investigation. And finally investigators will tend to rely on newsmen's investigative work rather than pursue their own.

The news media will consequently take on the image of being part of, rather than distinctly separate from, official governmental processes and the authority of the State. Press credibility will suffer. Worse yet, if the Government can subpena the media's notes, tapes, film, and outtakes, it can easily set itself up as a kind of supereditor, passing judgment on the accuracy and objectivity of the gathering, editing, and publication of news. It is but one short precipitous step from the government as supereditor to the government as supercensor.

I can think of no single issue pending before Congress or the Nation at this time which more fundamentally affects the delicate balance of our democratic process. The public's right to know—more to the point, the public's need to know—is dependent on the ability of the press to protect all of its information and all of its sources of information.

I know this subcommittee and the full committee will wisely consider all the consequences and long-range implications of the bills before it, and will devote its experience and energies to insuring that the people of our land receive the information they must have for our democracy to work.

Mr. Chairman, I thank you.

Senator ERVIN [presiding]. You have a most thoughtful statement. I have serious constitutional questions, however, about the capacity of Congress to pass a newman's shield law which will establish a rule of evidence for the States. I say that because Congress has the power, of course, to pass any law that is necessary or appropriate to enforce the Constitution, but the majority of the Court held in the *Branzburg* and *Caldwell* cases that the first amendment doesn't give any rights to a newsman. I get a lot of wisdom out of "Aesop's Fables." I remember the story about the dog that had a bone and was crossing the creek on a foot log. He saw a reflection of the bone in the water and thought there was another dog down there who had another bone and he wanted both bones. When he opened his mouth to grab the bone that was reflected in the water, he lost the bone he had.

Now in view of the fact the Supreme Court has said that the first amendment doesn't give any privilege in this field, I doubt seriously whether Congress can legislate with respect to the States. It seems to me that the better part of wisdom, instead of running the risk of losing a good "bone" by going after a bad one, would be for us to develop a good shield law here. I think the press has enough influence with State legislators to get it duplicated if it is a wise one. I believe that is the wisest method with which to proceed.

Senator CRANSTON. I recognize, first, your expertise in constitutional law and obviously do not pose as any expert in this field. Others who are experts will present the view that there is a reason to perhaps conclude that the Constitution would permit involvement here. The commerce clause might well be the basis for that.

I speak only from the point of view of one who has been a newsman, one who has, too, been simply a private citizen and now a public official. I recognize that news is national in scope. I feel that I as a citizen will not have access to all of the news if there are laws that hamper new work in some parts of the country and I feel that confidential sources will be very confused and all too cautious if it is not clearly understandable throughout the Nation what protection they get and what protection they perhaps do not get.

Senator **Ervin**. Also I think there is a pragmatic question before those of us who favor some kind of shield law and that is what kind of law can we get Congress to pass. As the U.S. Court of Appeals said in the *Caldwell* case, and I think its opinion is one of the greatest judicial opinions I have ever read, any shield law must recognize an interest of society in the prosecution of a crime and also, of course, an interest in the society knowing what is going on in this country. I was in hopes that the Supreme Court of the United States would recognize there is a constitutional principle involved and that the Supreme Court would adopt the wise view that the U.S. Court of Appeals adopted in the *Caldwell* case and balance the two interests in each individual case—rather than leave it to us to have to pass a law. But I certainly agree with you that we do need some kind of a law that would at least protect the people at the Federal level, and because it is essential, as you point out so well in your statement, for the public to know what is going on in the field of crime and corruption. Most of the information about these areas is going to come from people who would be very reluctant to have themselves disclosed as those who informed the newsman. Certainly it is essential, I think, to get some kind of good shield law passed.

I want to commend the support which you have always manifested for some concrete and definite action in this field.

Senator **Cranston**. Well, thank you very much, Mr. Chairman. Let me stress my very deep conviction that it isn't just a matter of getting some kind of a shield law passed. Congress might very well pass a shield law that would set us back rather than forward and I would oppose a bill that had qualifications in it that would destroy the protections that it is my purpose to enact. We could get a very bad bill as well as a good bill.

Senator **Ervin**. I agree. One reason I am of the opinion State shield laws are not very satisfactory is that they have so many qualifications, some of which are artificial in nature, and in most cases, they do not solve the problem. I think we need a concrete definite law that can't be misconstrued by the courts.

Senator **Cranston**. Yes, that is the problem. The various proposed qualifications sound fine and they are well intentioned but when you try to analyze how they will apply in specific cases you find there are giant loopholes that can actually destroy the protection we seek to give.

Senator **Kennedy**. I, too, want to thank you for appearing. I agree with your concluding comments and statements about the importance of assuring that any legislation is going to be of sufficient description as to insure a real fundamental guarantee in these areas and not serve as a means of restricting them. And I think you're on solid ground when you quote your constitutional authority. As you pointed out, we are going to hear from experts later on but certainly in any review of the commerce clause it is rarely used to restrict the authority of the Congress, going all the way back to the classic example we remember from law school, the *Schechter* case, it is difficult to first believe it would not be so expanded or interpreted as affecting newsmen and the news industry in this respect, and if it does, then we are entitled to the necessary proper course to act to justify the views and we will be getting into it finally.

I just had one or two questions, Senator Cranston, but you have obviously reviewed the history of newsman's privilege. Why do you think that it is so threatened today? Why do we have the proliferation of subpenas and harassment today? What is there different in terms of attitude toward the news media today as contrasted to the earlier day of the Republic that would be confronting this issue? As someone who has reviewed the history of this, what would be your conclusion?

Senator Cranston. I think it may be in part because Government has become bigger and more complicated, less difficult to understand. People in Government seek to present what they are doing in the most favorable light. They resent it often when it is not looked upon in that favorable light by the media. And it seems to me that there have been some efforts to intimidate the media and to restrict their access to facts in order to have the Government able to present its actions in the most favorable light possible and to prevent criticism of those actions.

The bigger Government gets the more important it is, I think, to have open Government. This means total access by the media and through the media by the public to information about what that Government is doing. I think our basic freedoms will be in grave, grave jeopardy if we don't reverse the trend that has taken us toward closed Government.

Senator Kennedy. Do you think it is somewhat reflective of the Government's attitude or different Government attitude toward the press or this Government's attitude toward the press.

Senator Cranston. I feel that and the *Caldwell* case which was instigated by the Federal Government led to the new situation we now face where Government apparently feels it can reduce the ability of the media to gain access to facts by the process of intimidation that affects both people in the media and confidential sources formerly freely available to people in the media.

Senator Kennedy. I want to thank you very much.

Senator Tunney. Thank you very much, Senator Cranston, for your excellent statement and the leadership that you have shown in this area.

I know that you, as a former newsman, have been one who has believed that there should be an unqualified privilege for newsmen to protect their sources. One of the dilemmas that I am concerned with is the competing absolute privileges that appear to be important constitutional privileges. Couldn't the sixth amendment privilege which provides a defendant with the right to face his accuser and the concomitant right to cross-examine that accuser, clash with an absolute privilege that a reporter might have protecting his source in, for instance, a libel case. Have you any thoughts that you care to give to the committee regarding a balancing of these privileges?

Senator CRANSTON. I believe that the constitutional provisions for due process and a fair trial provide adequate protections in criminal cases. If it is found that a defendant in a case will be denied those constitutional rights under circumstances where to avoid revealing a source, a court would, I believe, decide in that case that the law to provide unqualified protection was unconstitutional, as applied to the set of facts in that particular case. In that event, if there was a new trial, the newsman would have to testify or go to jail.

Senator TUNNEY. But then in that particular fact situation in which the court compelled the revealing of the source, you would not have an absolute privilege. You would have in that instance a qualified privilege, qualified by the court's interpretations of the rules of procedure.

Senator CRANSTON. That is true. That is because the Constitution requires that result and the Constitution would override whatever legislation we might write. The legislation that I propose is prepared with that in mind.

Senator TUNNEY. One of the things that I am also concerned about is the question of national security being a ground for qualification. I was in a colloquy with Senator Mondale going to the question of classified materials and revealing of information that was classified. Presumably it is classified because national security is involved. On the other hand, we are faced with instances where high executives in departments will reveal classified information if they think it is in their best interests or the best interests of any of the administration to do so, and at the same time a person lower down in the department who would reveal that same information could be prosecuted for having revealed it.

It seems to me that these cases demonstrate how terribly difficult it is to know when national security is involved. One of the reasons that I am concerned about a national security qualification is that history has demonstrated what is meat for one man is poison for another. Depending upon one's position in Government, revealing classified material may or may not affect national security. I wonder if you have the same impression that I do with respect to that point?

Senator CRANSTON. I do and I oppose any qualification in regard to national security or any similar such phrase for exactly the reasons that you cite. You can stretch that to cover almost anything, as everyone knows who has studied the matter, and what we would find would be that in all cases where there was national security potentially involved sources of information would dry up and the public would not learn about such potential threats, and, moreover, law enforcement and people in charge of handling our security problems would not gain the things they can presently gain from confidential news sources available to the media. They and we would all be worse off for that. The public would be in ignorance and national security would be more threatened.

Senator TUNNEY. I certainly feel very strongly that the Congress must pass legislation in this area and I think you have contributed a great deal to this committee's consideration of that legislation.

Thank you.

Senator **Cranston**. Thank you very much.

Senator **Ervin**. Senator Gurney.

Senator **Gurney**. Let me commend you on that excellent statement, too, Senator Cranston. I don't know whether you were here when we opened the hearings up or not, but I made a few remarks about the necessity for going into this subject, particularly the part of the subject that has to do with responsibilities on the part of the media. I raised a couple of questions in connection with that. One was the matter of libel. Since you raised it in your statement I would just like to ask you a question or two about it. I am not talking about libel as the exception in a shield bill, I am talking about the present libel law.

As you know, the Supreme Court in *New York Times* against *Sullivan* held that a public official must now prove malice in connection with a libel suit, which I think pretty much does away with any libel law at all. What is your thought on that? I am not asking whether you think it ought to be revised. I am simply asking whether you think, maybe, a public official today, has any redress at all under our present libel law?

Senator **Cranston**. Well, first, we agree this is separate from this legislation?

Senator **Gurney**. Yes, it is not included in any of this legislation.

Senator **Cranston**. I personally feel that one who enters public life should not have the protections of a libel law. I feel that those who wish to criticize you, whether in campaigns, your opponents or in the media, should have that freedom and they should be free to make whatever charges they chose to make and if they can't make them stick in the public arena of political debate I think it will become apparent they were ill founded. But I just don't feel that there should be a libel law which would tend to restrict the freedom of citizens to be critical of those who enter public life. I think that is one of the prices that should be paid for being in public life and if you cannot stand the heat then you do not belong in that particular kitchen.

Senator **Gurney**. Let's take this situation. Let's assume most of your newspaper reporters, and I think that is certainly true of the Capitol press here, are responsible. But I have seen instances, and I know you have too, where you have local press people who are known as hatchet men. That is their job. They are hatchet men who tear up people in public office as well as other people too. Do you think that that sort of a newspaper reporter should go completely scot free? Don't you think there should be some means of making a reporter like that, and his publisher, responsible?

Senator **Cranston**. I really do not think so in relationship to people in public office. I think we must rely on the professional responsibility of those in the media. The publishers and the reporters for the most part exercise it well. I think they do not in all cases.

Some journalists are irresponsible. You always have irresponsible politicians and I would be very fearful to write a law governing the behavior of irresponsible politicians in the same way I would be very wary of a law to govern the behavior of people considered irresponsible reporters. Because who makes that decision?

And I am very fearful of Government getting into the area in any way, shape or manner to decide when the media is responsible or when it is not, because that is the beginning of a loss of the freedom of the press and editing and controling responsibilities moving away from the press toward Government. Then you do not have a free press.

Senator **Gurney.** Now we are talking about redress for harm done as well as responsibility. Throughout our life, as far as I know it, if real harm has been done to somebody that somebody has a right to go to the court of law and seek redress. That is what courts are all about. That is why we have them. So why should you protect in one category of our society a class of citizens who aren't responsible or don't have responsibility for their actions? This is in fact what you are saying.

Senator **Cranston.** Well, I am not saying that. I am just fearful of any effort to legislate in any way where government, through the courts or otherwise, gets into the decisionmaking process about whether the media is behaving responsibly and where it is not behaving responsibly. I particularly feel that people in public life should not have financial redress for alleged libel damage. If there is some way to clear up the facts without getting into a damage action, perhaps that would be useful, but again I am fearful of where we go and I would like to look very carefully at any legislation suggesting even such a factfinding approach to deal with the libel laws.

Senator **Gurney.** One other observation which I think is probably part and parcel of this. Public opinion polls show today that beside politicians being among the lowest in public esteem in this country, and that is a fact, so are newspaper reporters and so are media. "Dan" Moynihan, a very fine liberal Democrat who has worked for three administrations, wrote a very good article in the *Washington Post* about 2 years ago. It might have been written by almost anybody, but it was rather a surprise for me to read it coming from Mr. Moynihan. The whole thesis of that article was that news media attack government and public officials so much today, so consistently, in all forms and varieties, that now public officials are being held in contempt and distrust by the mass of our citizenry. As a result, citizens really don't have much faith in their governments or the people who serve in public office. His final point in that article was that he believed that if this continues in a society like ours, unrestrained, he was fearful that our kind of free democratic society could not exist and continue and work. I thought it was a very interesting article. I only mention it because I think that this is part of the hearings that we are holding here and I think we should look into this thing as well as the shield. As I said earlier, if you are going to guarantee a right, and this is what we are doing here, of course, a right of publishing anything you want to, then responsibility goes along with that right. I think we need to look into that facet also.

Senator **Cranston.** Even more of a threat than people being able to freely and therefore sometimes irresponsibly criticize government is, in my opinion, any step that effectively reduces their freedom to criticize or create fears in that regard. This is not a new development. When you read about the Founding Fathers, the giants of those days—Washington, Jefferson, Madison, and Monroe—and Abraham Lincoln in his time, you find the most scandalous terrible things published about them. There has always been this freedom to criticize very freely exercised in our country. The country has survived and I think it has survived in part because of this freedom of speech and criticism and the strength that it gives to individuals in our democracy.

Senator Gurney. I would totally agree with you that there should be total freedom of criticism. That, of course, is not what I am talking about. What I am talking about is the publication of falsehoods that seriously damage a person's character, credibility, and ability to perform in the public office, since we are talking about the public office. I would also make another comment too. I think things have changed very drastically since our Founding Fathers' time or even 100 years ago or even 50 years ago. I can remember as a young lawyer in New York we had a great many more newspapers in New York City than there are today. There is only one morning newspaper there in that great metropolis and that is true in most other large cities. Your morning and evening newspapers are usually by the same press and frequently they own a television station and radio station. Where there were a multitude of news media, at least in print form in the early days of our country, there aren't now. We do live in a changing society, but I think that in many cases a man in public office or as a private citizen, should talk about them as well as ourselves, because there are more of them than there are of us. We really have very little chance now of seeking redress under the present libel laws and the present system of what amounts to, indeed, a monopoly like a public utility monopoly. There is not even any way really of getting in the newspaper business, or a new television network, or getting another television station, so I think we need to look into all of those things.

Senator Cranston. I don't know of any community of any size in our country that has a monopolistic situation in regard to news media. There is in every community that I can think of at least one newspaper, often more. Community newspapers compete around New York and other major cities with the dominant newspaper, the one looked upon as the dominant paper. There are radio stations with growing proliferation in most communities. You have TV access and competition in most communities and with the development of cable TV you now have a proliferation of voices and viewpoints there.

Senator Gurney. I was talking about newspaper monopoly when I used the word "monopoly."

Senator Cranston. Very seldom. I know of no large city in America where there is a monopoly in terms of newspapers. The community papers are giving the major dailies a very tough battle for readers and for advertising.

Senator Ervin. Don't you think that the Founding Fathers placed the first amendment guaranteeing freedom of the press in the Constitution because they believed that our country has nothing to fear in the long run for freedom of the press as long as it leaves truth free to combat error?

Senator Cranston. Absolutely.

Senator Ervin. And don't you believe that if you attempt to regulate freedom, any kind of freedom, so as to prevent it from being abused, that you are likely to wind up with a destruction of that freedom?

Senator Cranston. I do without question.

Senator Ervin. And the truth of it is a man doesn't have any freedom at all unless he has freedom to act wisely or foolishly under given circumstances, doesn't he?

Senator CRANSTON. I agree again. Mr. Chairman, I am considering certain revisions of S. 158. If I subsequently do submit such amendments, I would greatly appreciate your printing such amendments in the hearing record.

Senator ERVIN. Thank you. Without objection, any amendments to S. 158 will be included in the hearing record.

[Subsequently, on March 8, 1973, Senator Cranston submitted a substitute text for S. 158 which is listed in the appendix.]

Mr. BASKIR. Our next witnesses are Mr. Fred Graham and Mr. Jack Landau, who are representing the Reporters Committee on Freedom of the Press.

Senator ERVIN. We appreciate your willingness to come here and give us the benefit of your views in the field in which you are very knowledgeable.

STATEMENT OF FRED GRAHAM AND JACK LANDAU, ON BEHALF OF THE REPORTERS COMMITTEE ON FREEDOM OF THE PRESS

Mr. LANDAU. My name is Jack C. Landau. I am a working news reporter employed as the Supreme Court correspondent of The Newhouse Newspapers. I am accompanied by Fred P. Graham, a working news reporter employed as a Washington correspondent for CBS News. Mr. Graham is a member of the bar of the State of Tennessee, and I am a member of the bar of the State of New York. We are here today as individual reporters in our capacities as members of the executive committee of The Reporters Committee for Freedom of the Press. We have a rather long written statement which we would like permission to submit for the record and we have a very short version of it which we would like to read with some additional comments.

Senator ERVIN. Let the record show that the entire statement will be printed in full in the body of the record after the testimony of the witnesses.

Mr. GRAHAM. Mr. Chairman, I want to thank you for the opportunity to appear here again. As you know, I testified once before in front of this subcommittee in its general inquiry into the relation between the Government and the press and now that we are down into this more specific point I appreciate the opportunity to express the reporters committee's view on these subjects. We are simply going to file our prepared statement, at least concerning my part, Mr. Chairman, and I would like to address myself to a few points that have come up this morning and have been points of particular inquiry on the House side in hearings on this same subject.

As you know, the Reporters Committee supports essentially the views expressed by Senator Cranston immediately preceding this testimony. We favor an absolute newsmen's shield law, absolute in the sense that it would not be qualified with provisions that would permit the shield to be waived by a court or removed by a court under certain circumstances. We favor a preemptive Federal statute which would apply in the various States and to the Federal Government and to various bodies—judicial, administrative, and legislative.

Our reasons for both of those, Senator, are underscored by what Senator Cranston said. You will recall he said that people in the news media and apparently our sources assumed prior to the *Caldwell* decision by the Supreme Court, that we couldn't be forced to disclose confidential sources and confidential information—that the first amendment protected the sources from that sort of treatment.

We feel, and I have been told this by a number of reporters, that the *Caldwell* decision had a shock effect, not only on the people who would normally be our sources but I think the legal community. I think many lawyers and particularly prosecutors now feel that in some way the door is open to treating the news media as an arm of the prosecution and I feel in a sense they have taken the *Caldwell* case as affirmative encouragement to subpena reporters.

We have a compendium which we wish to submit for the record here, Mr. Chairman, which lists all of the known instances since the *Caldwell* case in which reporters have been subpenaed. I would ask your indulgence to withhold that for a couple of days. They are coming so fast since we prepared it last week we have discovered a couple more.

Senator ERVIN. We will be glad to receive any additional instances at any time before the hearing record is closed——

Mr. GRAHAM. All right.

Senator ERVIN [continuing]. Which you can communicate with us orally or by letter, any way that is most convenient for you.

[The document referred to is printed in the appendix.]

Mr. GRAHAM. All right, sir. Suffice to say for this occasion that the incidents of subpenaing, and particularly by State and local prosecutors, has risen tremendously since the *Caldwell* decision.

I have had one personal instance in which I had an opportunity at a story and lost it I believe because, it is very difficult to know, as you know, when a source has been frightened away by the threat of a subpena—but I feel there was one story that I might have had that I lost because of the subpena threat. Other reporters tell me the same thing.

Senator, I would stress that very few reporters have in fact disclosed sources. They have gone to jail. Now, if Peter Bridge and Bill Farr and some of the others had not gone to jail and in the headlines rather than the story of the newsman going to jail had been the story of one disclosing the source, I think the drying up of news would have been much more pronounced than it in fact has been. So I do hope that the kind of legislation that we support will be forthcoming before some people in the media have to cave in and disclose sources and accelerate this process of drying up of information.

I want to talk just for a minute about our feeling about an absolute bill, Senator, and then my colleague, Mr. Landau, will discuss the preemptive features.

We feel that it is strange that there is so much sentiment in the Congress for a qualified privilege when in fact of the State statutes that have been passed, a large majority of them are unqualified, are absolute. So we think it is odd that now that the Congress has finally turned to this question, there seems to be an assumption that there should be qualifications.

I think probably there are two reasons. One is that there are some very serious crimes in the Federal statutes—the crime of assassination of a President, threat to the national security, perhaps espionage, treason, and some others—and it is understandable that it would come to mind that perhaps there should be some qualification.

I think maybe there has also been a certain amount of herd instinct here, that the Pearson bill was the first one that was widely talked about and it had qualifications. I think that as other Senators decided to introduce bills they felt that they should consider that and include it in the bill. But we have analyzed the State statutes. As of our analysis in November of 1972, there were then 18. I understand there is now 1 more.

Mr. Chairman, as of that time, of 18 State statutes, only 5 were qualified. The other 13 State statutes had no qualifications. If the privilege applied to a newsman then it could not be removed by a court under any circumstances.

Now, as you mentioned earlier, some of those are bills. For instance, some of them include Mr. Landau who is a press reporter and unfortunately do not include Mr. Graham who is with the broadcast media and in that sense they are narrow. But these 13 States have no provisions for removing the privilege under any circumstances from a covered journalist. Alabama, Arizona, California, Indiana, Kentucky, Maryland, Michigan, Montana, Nevada, New Jersey, New York, Ohio, and Pennsylvania.

The States with qualified privileges are Arkansas, Alaska, Illinois, Louisiana, and New Mexico.

Mr. Chairman, if you wish, we could submit for the record the text of those bills and I will offer it now——

Senator Ervin. We would be delighted to have the text of all the State shield laws.

[The text of all State shield laws are printed in the appendix.]

Mr. Graham. Thank you, sir.

Now, shortly before we commenced our testimony, we were given your statement about the introduction of your bill. It is distressing that our committee would oppose this bill, Senator, and you are one of the outstanding supporters of press freedom in this country. But there are modifications here and qualifications that would seem to me to open the door for forced disclosure when it really wasn't warranted.

Senator Ervin. It only opens the door with respect to the testimony of the newsman where the party wishing his testimony is able to affirmatively show that in his work as a newsman he has acquired actual personal knowledge of the commission of a crime. In other words, he has personal knowledge which either proves or disproves that crime alleged or being investigated was committed.

Mr. Graham. Well, Senator, with all respect it seems to me that is the *Caldwell* case right down the middle. Earl Caldwell was accused of having heard a witness threaten the President and that is a crime.

Senator Ervin. I don't think it is. You must have two things to prove a crime. You have to prove the corpus delecti of the crime by evidence independent of a confession or admission. You have got to prove that a specific party committed the crime he admitted.

Mr. Graham. Well, as I understand it, you are saying here that the qualification here would require virtually a proof of the corpus delecti of a crime before a reporter could ever be subpenaed?

Senator Ervin. No. I don't quite say that.

Mr. Graham. Maybe that is wishful thinking, Senator.

Senator Ervin. I don't think in that first place you can get a bill passed that says that a newsman who acquires actual personal knowledge of a crime does not have to testify to it. I don't think you can get an absolute privilege of that nature.

Mr. GRAHAM. Well, with all respect, 13 of the 18 States that we know of that have these bills say exactly that. It is an unqualified absolute privilege.

Senator ERVIN. The reason you don't have more of them is that the newsman should not be accorded so absolute a privilege.

Mr. GRAHAM. Well, Senator, I have studied all of the cases that I can find coming out of these 13 States, and I don't know of a single instance in which justice has been frustrated because there was no way to lift this privilege and force a reporter to testify. I would respectfully ask this subcommittee to inquire of the Senators from these 13 States and see if that is so. I believe you are going to find it is so, and I think there is a reason for that, Senator.

Senator ERVIN. Well, I have a high respect for your study and opinion in this field because it is a field in which you are most knowledgeable. I am curious as to what phraseology you would adopt to get an absolute privilege. What would you say? What phraseology would you adopt to define when an absolute privilege exists?

Mr. GRAHAM. Well, we support the Cranston bill. We support the language of that bill, Senator, and as you know it sets up a privilege and for those who fall within that privilege there is no procedure for waiver of that privilege. It has seemed to us that where there are exceptions, the exception tends to swallow the rule. Where there is an exception to the privileges, judges have proved ingenious in finding that in any particular case the privilege doesn't apply because of some qualification. And it boggles the nonlegal brain, some of the cases that don't fall in the privilege. But judges quite often are able to do that so we feel if you have an absolute privilege, then there is no question. If the source believes that his identity is not going to be disclosed, he will help disseminate information to the press, but he is not going to study the language of these qualifications. If he hears a judge can say the privilege doesn't apply in some instances, he is going to be shy.

For instance, in the Pearson bill, Mr. Chairman, you will note that one of the exceptions is in cases of espionage. Well, there is going on right now in Los Angeles what we all know as the Pentagon papers trial, in which Daniel Ellsburg and Anthony Russo are accused of espionage for leaking papers to the press. If they are convicted, as I understand the legal situation, Mr. Chairman, that precedent would make leaking information to the press espionage. That means that under the Pearson bill, if it becomes law, virtually any leak would fall within the espionage exception to the privilege. As I understand it, a reporter could be required to testify.

Senator ERVIN. I invite your attention to Senator Cranston's bill, section 3, and ask you what the word "information" means?

Mr. GRAHAM. We may have to shuffle here to find that copy. You are referring to section——

Senator ERVIN. Section 3.

Mr. GRAHAM. Yes, sir. It says no person shall be required to disclose in any Federal or State proceedings the source of any published or unpublished information obtained in the gathering, receiving, or processing of information for any medium of communication to the public.

Senator ERVIN. In other words—what bothers me—if I see a man take a pistol and shoot another down, do I have information on that subject?

Mr. GRAHAM. You are saying, as I understand it, your concern is the reporter's viewing of a violent act in public.

Senator ERVIN. Yes.

Mr. GRAHAM. The purpose of the newsman privilege, obviously, Senator, is to keep open the channels of communication between journalists and their confidential sources. There is no need to pass legislation which would cover the viewing of a crime by anyone in public.

Senator ERVIN. It says here no person shall be required to disclose in any Federal or State proceeding the source of any published or unpublished information obtained in the gathering, receiving, or processing of information for any medium of communication to the public.

Now if I am a newsman and I go out where there is a riot going on and I see one man take a pistol and shoot down another; I am there for the purpose of receiving information for communication or medium of communication. Is that information within the definition of section 2?

Mr. GRAHAM. Well, of course, we should be looking at subsection 2, because subsection 1 is the source and that wouldn't be your source, if you saw a shooting.

Senator ERVIN. Well, that is questionable.

Mr. GRAHAM. I don't think anyone would argue that if I witnessed a murder that the murderer is the source of information to me. But I think subsection 2 says any unpublished information obtained or prepared in gathering, obtaining, or processing of information for any medium of communication to the public. This is the closest to the situation you raise. The answer is that I would publish the story. It would be a great story, and it would be on CBS News as soon as I could get it there, and it would not be privileged.

Senator ERVIN. Well, you received it while gathering information for any medium of communication. If a man sees something with his own eyes, isn't he a source of news? That is what bothers me about the Cranston bill.

Mr. GRAHAM. The problem here was reflected in the *Branzburg* case in the Supreme Court and you are aware what happened there. There was a statute similar to this in Kentucky. Paul Branzburg was doing some investigative reporting into marihuana and hashish sales there in Kentucky and as you know he was permitted to observe the mixing of some hashish. He was able to write a story to tell the people in that area what was going on with their young people and how this was being done.

Now, they had a shield law in Kentucky. But it was held by the courts of Kentucky that it didn't apply because he had seen a crime being committed.

Obviously, it would have been better for the public to know what was going on in such illicit activity as drugs than to have the testimony, which they didn't get anyway. I think this proves what we in the press have always believed was true anyway, and that is when a journalist gets information about the commission of a serious crime he imparts that information. I have done it myself and all of us have done it. The cases that have brought this issue into this room are not murder cases, they are not kidnaping cases, they are not assassination cases. It is prosecution in connection with militancy, in connection with drugs, and in connection with official corruption, and that is precisely the instances in which the public deserves to know what is going on and not have its access cut off because of subpenas.

Senator ERVIN. Senator Gurney.

Senator GURNEY. Is it the point you make that where a serious crime like murder and kidnaping is involved the newsman is not going to be invited to view the crime?

Mr. GRAHAM. Yes, sir. He is not going to be invited to view it. If he sees it, he is certainly going to pass the word. It is hard to deal with this because nothing like this has ever happened, Senator. We have 13 States where it could legally. It hasn't happened.

Senator ERVIN. Just one more observation. To me, I think the newsman is entitled to be exempt from disclosing information he receives from other people but not the things he knows exactly himself.

Mr. GRAHAM. I sympathize with that, Senator. As you well know, we have been working very closely with this committee and with its staff.

Senator ERVIN. Yes, sir.

Mr. GRAHAM. And maybe we have a problem of semantics here because the newsman's privilege idea has nothing to do with one who observes a murder. The thing that concerns me is making a reporter repeat what he was told in confidence. I am afraid that under the bill that you have proposed here, Earl Caldwell would clearly have been required to testify because he allegedly was told that a man named David Hilliard had threatened the President's life.

Senator ERVIN. Did David Hilliard tell him that?

Mr. GRAHAM. Yes, sir; that is what my understanding is.

Senator ERVIN. My trouble is this: My father who practiced law in North Carolina for 65 years always told me that a court is where the thing has to be decided. If you want to prove something is a horse, he said the first thing to do is draw a picture of the horse and fearing the judge won't understand that, write under it, "This is a horse." That is the kind of law I want.

Mr. GRAHAM. That is the kind of newsman's privilege law we want. Because if by some unfortunate occurrence it should not be preempted then it should be the sort of statute that will serve as a model for the States. We feel very strongly that experience has shown that the absolute privilege does not cause problems. It also has the virtue of simplicity and if the Congress will pass an absolute bill along the lines of the Cranston proposal, it would serve as a model for the States.

Senator ERVIN. You would favor a bill so simple a person who is a newsman engaged in accumulating information for the dissemination of the public not be required to testify at all.

Mr. GRAHAM. No, sir.

Senator ERVIN. I think our objective is the same, it is finding the phraseology that will carry it out.

Mr. GRAHAM. I hope we can work on that, Senator. Thank you very much.

Senator ERVIN. That is the purpose of these hearings—to see if we can phrase this. It is a very difficult kind of bill to phrase. I think anybody who has tried to do it is conscious of that and we'll see if we can come out with a bill that will get majority support of the Senate and House. I don't personally favor an absolute privilege, but I would rather have an absolute privilege than none at all if we can get a bill drawn tight enough to show exactly what it covers. You have been of great help to this committee. I am sure you and I don't differ very much on the objective. It's just a question of finding the path by which we can get to the objective.

Mr. Landau, do you have a statement?

Mr. LANDAU. I would like to say a brief word about preemptive features of the bill; a subject I know you are quite interested in. We believe it is absolutely critical that the privilege be preemptive. We believe that Congress does have the power under section 5 to extend the privilege to all States, executive, legislative, and judicial proceedings under Congress' power to implement the principles protected by the first amendment. We are backed in this appraisal by two constitutional professors of differing approaches. Prof. Paul Freund and Prof. Archibald Cox, and we would hope that you would be fortunate enough to invite them to come down and testify. It is an open question in terms of section 5 as we understand. We also think that you have a power under the commerce clause, as Senator Cranston has said, because in this day of instant communications a news event anywhere is really of importance to people all over the country. Most newspapers do have circulation across State lines, almost all television and radio stations do, and it is clear the restriction on right to know in one State affects the rights of citizens in other States to know about news which they consider very important.

We also think it is important for uniformity purposes because the tendency of the State judges, as Mr. Graham has pointed out, has been to find every conceivable loophole they could find. In the *Farr* case, the lower court found that the privilege didn't attach after Bill Farr left the news business. The appellate court turned around and said "We don't have to decide that issue because the State legislature doesn't have the constitutional power to invade the constitutional powers of the State courts to protect their own integrity." There have been a number of other cases which we have listed which we will submit to the committee.

So far in the hearings over on the House side, the most extensive objections to the preemptive feature were given by Mr. Cramton from the Justice Department. He made a number of points and I assume the Department will probably come up here and make a similar argument. He said, for example, that Congress would be imposing a "straitjacket on the 50 States by passing Federal legislation to govern the availability of information before State courts and legislatures." We would respectfully point out that there really are dozens of federally imposed rules for limiting information available to State agencies. The fourth amendment limits illegal searches and the fifth amendment limits information available for self-incrimination and the sixth amendment limits information for illegally obtained confessions and, of course, the first amendment limits attempts by States to obtain information which would violate freedom of association.

Mr. Cramton has also stated that Congress "has never attempted to legislate general rules of civil or criminal evidence or general rules of evidence for the States."

It is our understanding that Congress had done this at least twice. There is a current statute which apparently derives from an 1857 statute which grants immunity in State courts. It provides that no testimony given before either the Senate or the House can be used in any criminal proceedings. In 1954, in *Adams* v. *Maryland*, Maryland claimed precisely what the Justice Department claims, that it violates the principles of federalism and was beyond the scope of Congress to impose evidentiary privileges in State proceedings. And it is our understanding that Mr. Justice Black, who wrote the opinion for a unanimous court, said that "Since Congress in the legitimate exercise of its powers enacted the supreme law of the land, State courts are bound even though it affects their rules of evidence."

Senator **Ervin**. I think the *Adams* case is quite beside the point. As Justice Black pointed out in that opinion, Congress by enacting the immunity law in question was trying to get testimony before congressional committes and prohibit any evidence he gave before a congressional committee from being used against him in any court. Now, Congress had the power, as Justice Black pointed out, to get information before committees so they could frame legislation. I think that is quite a different kettle of fish.

Mr. **Landau**. Well, with all respect, Senator, I think we would say Congress has substantial interest in protecting the free flow of information and news to all citizens in the country.

Senator **Ervin**. I am unable to find where Congress has the power to prescribe, in an area not related to the exercise of any other congressional power, what State courts shall resort to in the quest for truth.

Mr. **Landau**. Well, I suppose I would just have to stick with the case itself as standing for the principle that Congress may limit the otherwise lawful ability of the State courts to elicit information on crimes under congressional power to preempt State evidentiary rules, and basically that is what we are arguing; Congress has the power as it had in the *Adams* case.

Senator **Ervin**. Do you take the position that the *Adams* case establishes the proposition that Congress can undertake to regulate the rules of procedure and rules of evidence in State courts?

Mr. **Landau**. I think if the interest is a substantial national interest. As you yourself pointed out, there is a substantial national interest in persons coming before both Houses of Congress and giving information to the Congress.

Senator **Ervin**. Well, of course, you can take the Interstate Commerce Clause and make an argument that that wipes out all State power entirely. You could make an argument on that and find a few decisions that tend to sustain it. I might hypothesize, that under the Interstate Commerce Clause, Congress could undertake to encourage murder in the States because, by encouraging murder in the States, Congress promotes the shipment of caskets in interstate commerce. The same thing might be said of Congress regulating sexual intercourse. Sexual intercourse produces babies, and babies stimulate the flow of safety pins and diapers in interstate commerce. But I don't go quite that far under the Interstate Commerce Clause.

Mr. **Landau**. We were not using this as an interstate commerce jurisdictional argument for Congress. We were using it basically as an argument to supplement the section 5 argument. If Congress makes a determination that it is in the national policy to encourage the free flow of information in news, then we think Congress does have, under the *Adams* case, the jurisdictional power to provide the testimony of privilege in State court proceedings.

There is a second case, interestingly enough, involving the Interstate Commerce Clause. There is a statute, 1954, Witness Immunity Act, which does provide that persons who appear in front of grand juries under specified circumstances are privileged from prosecution and also that their testimony may not be used against them. And interestingly enough, the derivation of the statute is an 1893 statute which originally granted the privilege for appearances before the Interstate Commerce Commission or for grand jury or criminal trials involving violation of the Interstate Commerce Act.

Senator **Ervin**. That is why the immunity is given to them—to procure the testimony in a Federal court.

Mr. **Landau**. That is right. But the testimonial exclusion applies to the State courts, too. So the Congress and the Supreme Court upheld that in *Ullman*.

Senator **Ervin**. Only they held in the *Adams* case, and I think in the other case also, that that didn't prevent the court, the State court, from trying the case according to its own rules of evidence. But it couldn't introduce in evidence against the man the testimony he gave before a congressional committee or before the Federal grand jury.

Mr. **Landau**. That is true. It abrogated the power of the State courts in that limited instance to compel the testimony and we are arguing that the Congress, therefore, has the power to abrogate in these limited circumstances the power to compel testimony from newsmen.

Senator **Ervin**. Let's carry that argument a little bit further.

Mr. **Landau**. You are a real expert on this.

Senator **Ervin**. I am trying to test it. It is very intriguing, a very crucial question to this inquiry. Suppose now Congress wants to stimulate the flow of information in interstate commerce. It could do so very effectively by saying that no person who had any knowledge of any crime should be compelled to testify in a State court with respect to that crime. Otherwise he may be tempted not to give information to the newsman.

Mr. **Landau**. Well, I suppose you get at a point where you are making reasonable determination as the Supreme Court would say, whether this is reasonably related to the end. Of course, we argue that there is a burden on commerce now that throwing Mr. Farr in jail and harassing Mr. Caldwell and all the other reporters is burdening commerce and it is slowing down the free flow of information and news across State lines. While we would prefer the section 5 approach by incorporation because we think that the first amendment directly applies on a national basis and this is the preferable approach for the Congress to take, we think that the Commerce Clause is a perfectly legitimate jurisdictional approach to this.

Senator **Ervin**. Don't you agree with me that it would have facilitated Mr. Caldwell's obtaining information from the Black Panthers if you had a law that the Black Panthers who communicated with Mr. Caldwell couldn't be compelled in a Federal court or State court to divulge the content of their conversations with Mr. Caldwell?

Mr. LANDAU. I haven't thought about that one. We would like to make one additional comment, and that is really not a primary jurisdictional argument but a secondary one. Clearly it was contemplated in article I that Congress had the power to stimulate news and ideas by a specific grant of copyright; and while we are not making a direct comparison between the copyright power, we are saying that this falls within the type of powers that the framers intended Congress to have. And as you know, the copyright power applies even in purely intrastate transactions and preempts all State regulations involving the purchase of printed or other material covered under the act. So we would hope that, perhaps back in the 18th century, they didn't foresee the same type of problems we have now; but certainly the framers were quite concerned with encouraging information and ideas both from authors and inventors with the patent law as a part of this protection. But, we think, that it would almost stand on its own as a separate exercise of the jurisdictional power because, of course, as you know, newspapers have copyright law protection and it has become a complex argument.

Senator ERVIN. I certainly agree with you on that observation. I was in hopes the Supreme Court would agree with us that the first amendment had some application to that situation, but a majority of them unfortunately did not. I certainly agree that the first amendment was intended to stimulate discussion, and the obtaining and dissemination of information. I also think the Supreme Court or at least five of the members, missed a glorious opportunity to do something very constructive under the first amendment in this whole field.

Mr. GRAHAM. Can I add one comment there?

I don't think we should feel that it is such a radical idea that Federal law should regulate in certain ways the evidence that can come into State proceedings. When I was practicing criminal law 10 years ago it did not. We only had to consider State law. But since then, as you know, lawyers have become very accustomed to making motions based on the Federal Bill of Rights. Certain information can't go into evidence because it violates the fourth amendment or the fifth amendment or the sixth amendment. State judges enforce that; they have become accustomed to it. It doesn't appear to them to be any violation of the theory of federalism at all. The basic difference here, of course, would be that the regulation would be based on statute rather than an interpretation of the Bill of Rights. But I repeat what Mr. Landau said, it seems to me that under the precedents of the last few years, if Congress decides that in order to properly enforce the first amendment of the Constitution through the 14th, that it should pass shield legislation applicable to the States, then I don't think that there would be any constitutional problem. I think the State judges would look at that as another extension of what has happened in the last 10 years anyway with regard to their criminal law.

Senator ERVIN. Well, of course, there have been great changes in the criminal field as a result of the Supreme Court holding that the due process clause of the 14th amendment makes certain specific provisions of the Bill of Rights applicable to the States on the idea that it relates to what they call liberty.

Mr. LANDAU. We would point out one thing. With all of the time and effort we have put into this we are very appreciative. We would hope that you would consider the grotesque problem that would arise if Congress, after all of these hearings and all of this research, passed a law applicable only to the Federal jurisdiction because most of the types of crimes which a grand jury would be interested in would be protected under the Federal law but would be unprotected under the State laws. You would have this dual jurisdictional problem; and if Earl Caldwell was really to be protected in California in the Federal jurisdiction there would be nothing to stop the California grand jury from trying to get the same information because I assume it is a crime in California to threaten the life of anyone.

And so it's going to be really no protection at all because there is hardly a crime or a type of official misdeed which would be reported by the press which would not violate both State and local laws. It would be no protection at all for the newsman to say to his source, "Well if the roulette wheel hits in the Federal grand jury you are protected, if the local prosecutor goes after me you aren't"; and it seems to me that would defeat almost the whole purpose of a shield law and we would have a very bad psychological effect, because the press would feel, in a sense, that it had presented its case before the Congress and it is really still open to the same type of persecutions which we are suffering from now.

Senator Ervin. You can take care of this question by putting a provision in the bill that if a court decides that any provision of this bill as applied under the particular circumstances or to particular persons is unconstitutional, it shall not affect the other provisions of the bill. It would be quite possible to phrase a separatability clause that would take care of the question of whether Congress has the constitutional power to make it applicable to the States. The court, under the separatability clause, could hold the law unconstitutional, as applied to the States, but nevertheless valid as to the Federal Government. Do you know what I mean? Pass a bill that applies both to Federal and State courts and have a provision if it is judged unconstitutional in one effect it would not affect its applicability to the other situations.

Mr. Landau. I was really arguing the other side of the coin. The source would certainly be discouraged if he thought he could be hauled up in front of the State grand jury and that would defeat the purpose of the bill really.

Senator Tunney. Mr. Graham, you testified that most, if not all, reporters thought prior to the *Caldwell* case that they were given an absolute privilege under the first amendment to divulge a source. Presumably this absolute privilege applied also to viewing a crime. Is that correct?

Mr. Graham. I am sorry, I didn't catch the last few words.

Senator Tunney. Presumably, this absolute privilege applied to viewing the crime?

Mr. Graham. No, I don't think so, Senator. This whole issue has been dealt with in terms of confidentiality until the Federal Government started subpenaing outtakes from the television networks and the photographs taken at riots and disturbances. I think most reporters assumed it was only the confidential communications between reporters and their sources that was in any way covered. It is too bad some people have called this a newsman's privilege. It is not. It is a misnomer. It is not a privilege. The individual has the same duty as any other person when he is out walking down the street and sees a bank robbed.

Senator **Tunney**. If that is the case, then what is wrong with the chairman's suggestion that there be an exclusion in the law passed by the Congress where the factual situation was that of the newsman actually witnessing the commission of the crime if in the past newsmen never felt they had a privilege against testifying.

Mr. **Graham**. Again it turns entirely on the question of confidentiality. Senator Ervin's bill, of course, excludes from the privilege not only viewing a crime but being told by a potential defendant that he committed a crime. Now, that can be the essence of a confidential communication. Someone saying "I am in the hashish business and let me tell you that the police are letting us run wild and let me show you how I do it." He is both committing the crime and you are seeing him do it—mixing the pot. Perhaps we could modify Senator Ervin's bill, use language so we make it clear that the only thing that is being done here is to make it absolutely clear that a newsman who is not in a position of confidentiality and sees the commission of the crime, or is told by a person that he committed a crime, that situation is not covered. I think we would have no problems except for one issue that needs to be dealt with separately and that is the problem of a newspaper's photographers and a network's outtakes. The problem there is this:

There were riots at Howard University in this community about 3 years ago. The Government attempted to subpena photographs taken by local newspapers in order to get the identity of the offenders there. The newspapers took the position that if that ever once happened, those photographers were going to be fair game at any future disturbance. They weren't going to be able to operate, and the public would be denied pictures of what happened. That is also what has happened with the networks. If you could draft wording that would give a privilege to the outtakes of the networks and to the photographers of the newspapers, so that they would not become an unwilling investigative arm of the Government, then I would say that language such as Senator Ervin's, would give us no problem.

Senator **Tunney**. Does confidentiality exist when you are in a public place and a riot is going on. Aren't you actually observing the riot?

Mr. **Graham**. If I was observing a riot as a news reporter I would not consider it so. I do feel that the photographers, who are so easily identified by the people there, need to have some protection. Some provision should be made in the law to prevent the Government from using them as an unwitting investigative arm of the Government or they are going to be fair game and we are not going to have benefit of the picture.

Senator **Tunney**. You would distinguish in that particular case between reporters and photographers?

Mr. **Graham**. Yes, sir. We have not done so in the bill that we drafted and Senator Cranston endorsed because we drew up a broad exclusion that covered both. But that gives Senator Ervin problems because he thinks it would prevent the subpenaing of me when I witnessed a crime in public. My only answer to that is: if it does cover me as well as the photographer, experience has shown that people come forward. I assume you always have other witnesses too in that case.

Senator TUNNEY. Before the recent Supreme Court cases do you think that photographers felt that they were given the privilege under the first amendment if they saw a crime, actually photographed a crime, from divulging to the Government the photographs that they——

Mr. GRAHAM. What happened was prior to the *Earl Caldwell* case no one thought too much about this. I think it was one of those happy situations where the source assumed that when he dealt with the newsman he was not dealing with the Government, and a newsman assumed when he dealt with people in connection with a story that he was not going to become an unwitting arm of the Government. There was therefore a free exchange there.

Now, the instances that I mentioned of the Government attempting to get out takes and photographs all arose out of the outbreaks at the end of the 1960's. Suddenly we realized we had a problem that didn't exist before. I don't think most photographers had thought about it until people in the Government started attempting to obtain their pictures through subpenas. I had several of them tell me it would be an unhealthy profession if they had to honor those subpenas.

Mr. LANDAU. The drafting committee went through this problem quite extensively. It breaks down into a number of subsidiary problems. The first problem is news photographers and television photographers frequently get access to events because they are photographers and for no other reason. That is to say, people who are going to hold a political meeting of some type; even with a great number of people, perhaps two or three hundred people, they see a fellow from CBS come in and he shows his identification and they let him in because they know that his purposes are only to disseminate news; not to be an agent of the Government. It is very hard to protect the integrity of the news photographers if we are not going to give them the same type of protection. We felt that the question of evidence would be very, very difficult. "How many other people were there? How many other people would they let in? Did they really know you? What did they think you were going to do with this film?" We adopted the position that all unpublished information, all information gathered by newspapers, if it was published, anyone in the world is free to see it and if it is unpublished it belongs to the press. Otherwise, once Government has substantial notice of the demonstration and the local chief of police goes out to the golf course and says "I don't have to bother sending photographers down there, I will subpena the local TV station, they are a good TV station, they don't miss anything." We feel as a matter of public policy Congress has to lay down the law and say to law enforcement the press is not a cooperative fourth branch of the Government in any way, shape or form.

Senator TUNNEY. I am troubled by the point that we have discussed for some minutes now, the issue of a reporter or newsman or photographer actually watching the commission of a crime and having an exclusion which exempts him from having to testify.

Mr. LANDAU. Is he doing this as part of his news gathering activities or on his vacation or quite by accident? I think that makes a difference. If a source, for example, calls up the *St. Louis Post-Dispatch* and says, "we are going to burn down the ROTC building, send your photographers over there," and they send their photographers over, and they take pictures, that may be one thing; but if a guy just happens to be wandering through the campus and sees the building burning not on a news assignment or any way connected with his news job, that may be quite another.

Senator Tunney. Well, I understand what you are saying. I just would hate to think that in drafting a law that we would be saying in effect that newsmen who saw a crime being committed would be given a privilege against having to testify in a court of law on that crime. I recognize that there are different types of crimes that are committed when a newsman is exercising his professional competence, when he is actually out there because he is a journalist or newspaperman, and the situation where he happens to be walking on the street and the crime is committed. I see the difference clearly between those two situations. I am not sure that the two situations ought to be treated differently in the law and I am open to further information and judgment on it, but I find it difficult at least in the first instance to accept that the difference should be evaluated differently by the law.

Mr. Graham. Senator, you are really speaking only of a reporter who sees a crime of violence being committed, aren't you?

Senator Tunney. Well——

Mr. Graham. What would you do in the case of Paul Branzburg who saw the hashish being made? Does that fall within what you are saying?

Senator Tunney. I think that that is troublesome. But it is not nearly as troublesome as the question of violence being committed. The thing that most deeply concerns me about recent developments is that confidential sources of information are now going to be exposed if reporters are required to go before the grand jury and tell where they got the information. I think that is the most troublesome aspect today of the recent court rulings. I distinguish that between the actual observation of a crime being committed but I am not sure having said that what my conclusion is.

Mr. Graham. Well, of course, we were instructed by our group and we agree with them that we support an unqualified and absolute privilege. But it seems to me it would be a shame if a hangup develops over a journalist observing a crime of violence and being shielded. I don't believe you would have 1 instance in 100 years where a reporter who observed a crime of violence would (a) be in a position of confidentiality; and (b) decline to voluntarily testify. So if that proves to be a hangup we would like to come back to you on that.

Mr. Landau. We might suggest one other thing. If you can give us a similar example of a doctor, while treating a patient who observes a crime, or an attorney while advising a client observes a crime, and this is part of the attorney-client relationship. We would like to make a comparison in some sense because we feel that the information, the type of relationship which has been set up to protect and encourage people to come in and talk to lawyers and doctors and clergymen is at least in terms of parameters—I am not talking about the exceptions here and there—is somewhat like the encouragement we would like to offer the general public to trust the press. And if you can think of a parallel situation I think that might be perhaps a good discussion.

Senator Tunney. Well, I would have to reread the rules of evidence, but it is my impression that if a lawyer observes a crime being committed by his client he is not protected from testifying.

Mr. LANDAU. *McCormick on Evidence*, appears to say that if the crime is sort of part and parcel of the confidential relationship—they are talking and the guy says I am now going to break the security laws—that probably would be covered. On the other hand, if the fellow walks in for SEC advice and turns around and picks up a rifle and shoots it out the window, that wouldn't be covered. I think the analogy is if the information is obtained as a result of news gathering activities, as a result of relationship between the source and a newsman, that would be one thing, but if the information is obtained purely as a private citizen walking down the street who sees a building blown up or something, that might be quite another.

Senator TUNNEY. Well, I would find it difficult to believe insofar as the administration of justice is concerned that such a distinction would be considered meritorious if the newman happened to be, we will say, covering a news story at the Federal building and he saw somebody walk in with a bomb and a few minutes later the building exploded. I would be troubled if the fact that he was acting as a reporter covering the courthouse or covering the Federal building should then give him an absolute privilege against testifying as to what he saw.

Mr. LANDAU. Well, I think reporters would testify except it is my understanding, and I am not as thoroughly versed on this as I should be in the other two privileges, the psychotherapist privilege and clergyman privilege in some instances, there may be for knowledge of crime which is covered by the privilege. So it is not a unique concept in terms of the privilege to even assert the privilege when there is knowledge that the crime will be committed in advance.

Mr. GRAHAM. It wouldn't be covered because he would publish it. It would not be unpublished information.

Senator ERVIN. My recollection tells me that the attorney-client privilege is not absolute. If a man goes and talks to his lawyer about how he can commit a crime, it is not privileged at all. If he goes for the purpose of finding out if he committed a crime in the future, it is only information that he gets from his client as to what happened in the past to charge him. Also in the jurisdiction in which I practiced, we didn't have any priest-penitent privilege at all, but we had the physician-patient privilege. But it was not absolute, the court could find that the ends of justice require the divulgence of the information and the physician might have to state it. I must say I found it was necessary to the administration of justice. I am not sold on the wisdom of an absolute privilege. I do have trouble with the proposition. I don't have any trouble with the proposition that if the newsman receives information in confidence, that he ought not to be required to divulge the sources or the content of it. I have the same feeling about unpublished information. I do have trouble with where a newsman, even if he accumulates this information in the course of his job, accumulates personal knowledge of the commission of a crime. I have difficulty in saying that he should not be required to bear the same burden of any other citizen and testify as to his personal knowledge. I distinguish largely on the basis of hearsay. I think my proposal is a good proposal and I think it takes care of about 99 percent of the cases. The average newsman doesn't have personal knowledge of what he reports. The news he gathers is based on hearsay from others. I think my bill will take care of the 95 or 96 or 97 cases of 100 and still leave it open for the newsman to assist in the administration of justice where he has personal knowledge of the commission of a crime.

Mr. **Graham**. Sir, in closing, when we submit our compendium with your permission we will analyze those cases and try and decide in how many of those the newsman had been given an admission or had seen something—a crime being committed.

Senator **Ervin**. I will appreciate that. That is the reason I drew my bill. I think as a pragmatic matter that it solves the problem in the great majority of the cases. If you can show us in a pragmatic manner that an absolute privilege works in a great majority of cases, we may be forced to reconsider our objections.

[The full text of Mr. Landau and Mr. Graham's statement follows:]

STATEMENT OF JACK C. LANDAU AND FRED P. GRAHAM, MEMBERS OF THE EXECUTIVE COMMITTEE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ON CONSTITUTIONAL RIGHTS, SENATE COMMITTEE ON THE JUDICIARY

The Reporters Committee is the only legal research and defense fund organization in the nation exclusively devoted to protecting the First Amendment and freedom-of-information interests of the working press.

The organizational premise of The Committee was that the constitutional interests of the working press may be different from the interests of media owners or groups with an interest in preserving First Amendment rights.

The Commitee was formed at an open meeting at Georgetown University in March, 1970, in response to the threat posed by the Justice Department's subpoena policies. It has been funded by personal donations from Steering Committee members and by modest foundation grants.

On behalf of The Reporters Committee, and of the working press as a class whom our Committee represents in court and in other ways, we are grateful for your invitation to testify before this Committee on a subject which is of critical importance to the nation.

Because we have faith that the Congress wishes to protect and encourage First Amendment guarantees, we believe that the Congress should pass, as soon as possible, an absolute and preemptive newsmen's privilege statute, protecting journalists from being ordered to disclose unpublished information before any executive, legislative or judicial body of federal, state or local government.

We strongly oppose any limitation on this privilege. We would also strongly oppose any legislation that is not preemptive—that is, which does not extend the federal protection to journalists involved in state court proceedings.

Mr. Justice White, in the Caldwell decision, issued the invitation to Congress to legislate in this area by noting: ". . . Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, re-fashion the rules as experience from time to time may dictate."

I. THE THREAT TODAY TO THE WORKING PRESS

News reporters and photographers have a peculiarly important interest in protecting confidential information. If they violate their promises of confidentiality they may never again be able to operate effectively, except to cover news which is offered by government handout or is a matter of public record. It is news reporters who are going to jail, like Peter Bridge of the *Newark News* who was incarcerated for 21 days; or like William Farr of the *Los Angeles Times* who spent 46 days in jail and may have to return for an even longer period. Fellow reporters came to the aid of both these men with their own personal donations in order to help pay their legal costs. It is news reporters like Neil Sheehan of the *New York Times* who risked indictment for espionage to bring unknown facts about the Vietnam War.

We ask you to consider what kind of nation we would be, for example, if the Pentagon Papers, the Bobby Baker affair, the Thalidomide horror, the My Lai Massacre, among others, and hundreds of scandals involving state and local government still lay locked in the mouths of citizens fearful that they would lose their livelihoods or perhaps even be prosecuted if their identities became known.

We believe that each working news reporter and photographer has his or her own constitutional rights of freedom of the press—rights which are not dependent upon the involvement of his employer but rights which inure to him directly under the First Amendment rights which guarantee that he can do his work free from any substantial interference by judicial, legislative or executive branches of any government.

These rights include a penumbra of constitutional protections—including the rights of citizens to freely associate with and communicate with the media, secure in the knowledge that no journalist can be forced to become, in effect, a government agent.

The *Caldwell* decision ordered journalists to disclose confidential facts and sources to state and federal grand juries allegedly investigating particular crimes.

But the decision has had a much broader impact than its limited holding. Federal and state courts have expanded the *Caldwell* decision to authorize disclosure in other areas—in criminal trials, in civil litigation and in contempt cases—in what amounts to a kind of open hunting season on the press.

For example, John F. Lawrence, *The Los Angeles Times* Bureau Chief, was ordered to disclose, in a federal criminal trial, the confidential portions of the tapes of an interview with a prosecution witness in the Watergate case, Alfred Baldwin III. Mr. Baldwin exercised the option given him by *The Los Angeles Times* to terminate the confidential relationship and the legal issue was thus rendered moot.

What is most significant about this case, however, is the fact that the tapes were sought, not with the intent of directly proving or disproving the commission of a crime, but for the purpose of impeaching or rehabilitating the testimony of the witness. The action of the lower court in the Lawrence case thus expands the coverage of the *Caldwell* decision from testimony before grand juries about alleged crimes to broad fishing expeditions into a reporter's knowledge about the character and personality of persons involved in criminal litigation.

In a recent case, three *Milwaukee Sentinel* reporters were ordered by a federal district court to disclose confidential information in a civil case involving the Civil Rights Act.[1] In another federal court action, investigative reporter Brit Hume was ordered to disclose confidential information in a libel suit.

In the state courts, the situation is even worse. Expanding the narrow mandate in *Caldwell*, California maintained that William Farr must disclose his sources because he violated a judge's trial publicity order. Peter Bridge was jailed for declining to give more details to a grand jury of an interview with a housing commissioner although the source had been named from the outset in what he published and was available to the grand jury. A Maryland grand jury sought information from David Lightman which Mr. Lightman obtained merely by posing as a shopper in a seaside resort town, a pose any police officer could have assumed without the necessity of subpoenaing a reporter.

These cases pinpoint another trend—the tendency to view the press as a readily accessible official "investigative arm of government", the tendency of the government to turn to the press first for information without making any serious attempt to obtain the information itself.

For example, in the *Caldwell* case, one of the questions sought to be asked concerned the identity of the Black Panthers' press contact, a man who had been publicly identified in a number of news stories.

In Memphis, two reporters disclosed abuses at a children's home. Instead of concentrating on the officials who operated the home, the legislative committee first focused on the two reporters and their sources.

In the dozens of subpoenas that were served to the networks to disclose outtakes of various demonstrations, there was no showing by the government that it made any preparations ahead of time to post its own cameramen.

In Chattanooga, a newsman was subpoenaed to reveal the name of a grand juror who claimed that a grand jury investigation of a judge was a "white wash." The court did not not even attempt to poll the grand jury but first called the reporter and then jailed him when he refused to talk.

These are some of the legal trends which are rapidly—case by case in all parts of the country—limiting the ability of the media to inform the public, in the wake of the Justice Department's subpoena policy and the ever-broadening uses of the Caldwell decision.

In the *Caldwell* decision, Mr. Justice White said that the fears of the press, and of members of the public who had joined the press, were purely "speculative" as to the dangers of forcing news reporters or photographers to disclose to the government information to which they had access only by virtue of their employment with the press.

We tried to point out at the time that the danger was more than "speculative." We were rebuffed by the Supreme Court, 5-4. Now, six months later, we believe we have an overwhelming factual case that there is more than a speculative danger—that censorship is here today. When newsmen have to face pressure tactics by government, have to pay for lawyers and engage in extensive litigation and even go to jail, when sources are persuaded to release journalists from their promises of confidentiality, when courts evade the clear intent of state confidentiality laws, censorship is here. It is not a "speculative" specter someplace in the indefinite future. We point out to the Committee that what started out as a localized infection involving three news reporters, Earl Caldwell of *The New York Times*, Paul Pappas of a television station in New Bedford, and Paul Branzburg of *The Louisville Courier Journal*, is now a censorship plague which is burdening news sources and impairing the public's right to know all over the nation. In this regard, we would like to submit for the record a list of recent censorship cases. We are a small organization without many resources and we are not sure that the list is complete.

Every major organized media group in the nation now supports enactment of a strong law, shielding journalists from forced disclosure, substantially restricted.

The similar feelings of many individual journalists are also a matter of record. For example, our Committee circulated a petition in Washington for 48 hours in an effort to obtain support in this city for *The Los Angeles Times* reporters who were involved in the court attempts to obtain the tapes of an interview with a witness in the Watergate trial. Without any public announcements in any of the Washington media—that is by relying purely on word of mouth—our Committee collected more than 450 names in 48 hours. We would like to submit a copy of the petition for the record.

We also point out that in *The Los Angeles Times* case, in the *Caldwell* case, in the *Pentagon Papers* case and in the *Ellsberg* case there are affidavits from over 100 reporters alleging that attempts to force disclosure of confidential sources and information has inhibited freedom of the press.

A recent Gallup poll showed that more than half of those interviewed favored legislation protecting journalists from forced disclosures, a figure that may have risen with subsequent jailings of journalists and intensification of government sources and information has inhibited freedom of the press.

A number of other surveys have been made showing widespread support for protective legislation among newsmen and the public and we can supply information on their findings, if the Committee desires.

Our central point is, however, that even if only one reporter or photographer had ever been threatened with forced disclosure, and even if a majority of the public failed to understand the dangers of the current situation, we would request enactment of an absolute, preemptive shield law. That is because even one instance of impairment of the First Amendment constitutes a danger to us all.

II. THE CRANSTON BILL

It is our understanding that, in the last session of Congress, 28 newsman's privilege bills and one joint resolution were introduced, and that in the current session there have been at least 24. We will address ourselves to only one of those bills, S. 158, the bill introduced by Senator Alan Cranston and by Rep. Jerome R. Waldie, and drafted by an Ad Hoc Drafting Committee convened by the American Newspaper Publishers Association.

That drafting committee included the American Broadcasting Company, American Civil Liberties Union, American Newspaper Guild, American Society of Newspaper Editors, Columbia Broadcasting System, National Association of Broadcasters, National Broadcasting Company, *Newsweek*, *New York Times*, Reporters Committee, and Sigma Delta Chi.

The ANPA has endorsed the whole bill. Many of the other groups support various portions of the ANPA bill or had not taken a formal position as of two weeks ago.

We offer our unqualified support for the principles enunciated by the Cranston bill. The bill offers an absolute privilege for confidential and other unpublished information for persons engaged in any medium of communication, involved in any federal, state, or local proceedings. We believe that the absolute privilege is necessary in order to counteract the increasing trend of censorship, to repair the previous damage done to the First Amendment, and to reaffirm, in the public's mind, the determination of the media to continue to inform the public fully while honoring all pledges of confidentiality.

Constitutionally, we believe that the Cranston bill is a sound proposal. It is based on the premise that the Constitution says what it means: that neither the Congress—nor the courts established by the Congress—shall make any law abridging freedom of the press by requiring news reporters and photographers to divulge confidential or other unpublished information. The bill is based on the principles enunciated by Justice William O. Douglas and the late Justice Hugo L. Black. Furthermore, we believe that once Congress begins asserting power to abridge the freedom of the press—then it is only a question of time and the whims of an uncertain populace that stand between a weakened press and even greater restrictions.

There are some who say that the acceptance by the press of any legislative protection—even an absolute protection—implies acquiescence to Congressional regulation. But we would reply that Congressional legislation is needed to stop the current wave of unconstitutional activities by state and federal governments. If conditions change, it may well be that the law may be revoked. There are others who say that the qualified approach is best. But we can only emphasize that there are grave constitutional questions with such an approach because, once the Congress assumes the power to limit freedom of the press, it can expand these exceptions until the right to know rests on the vicissitudes of politics and not on the enduring principles of the First Amendment.

One major emphasis of all the pending bills involves confidential sources and information.

This is covered by the Cranston bill approach which protects the identity of the source of any published or unpublished information and the content of any unpublished information.

By protecting confidential sources and information, the Congress will be granting to the news reporters a privilege similar to the statutory or constitutional privileges which are now enjoyed by attorneys for their clients, by physicians for their patients, by clergymen for those who seek their counsel and by police for their informers.

The public has an interest in the fair administration of justice, and for this reason, it has given confidentiality privilege to lawyers in order to encourage persons to consult them with legal problems. The public has an interest in adequate medical care and for this reason, it has given the confidentiality privilege to physicians in order to encourage patients to be honest about their physical and emotional problems.

The public has an interest in providing the free exercise of religion, and, for this reason, it has given the confidentiality privilege to clergymen to encourage persons to disclose their most troubling problems.

We believe that the public has an over-riding interest in the free flow of information and ideas, and for this reason, the Congress should restore the vitality of the First Amendment by reaffirming the protections which encourage citizens to disclose information of importance to the press.

By the very nature of his professional activities, the news reporter's concepts of confidential information are substantially broader than those of other professions.

News reporters consider information confidential if it is denied to the general public and offered to the press only under the implied or explicit understanding that it may be used only for news gathering and evaluation purposes and not to aid any branch of government.

We adopt this broad concept of confidentiality because, it is difficult, if not impossible, to draw the line as to where traditional concepts of confidentiality end. The press, with its special constitutional mandate on behalf of the public's right to know, is generally regarded as having the discretion to decide which information is considered confidential. Therefore, we support the concept in the Cranston bill automatically protecting all unpublished information without requiring the media to go through long evidentiary hearings to determine whether a source intended a certain sentence to be non-confidential—what was the tone of his voice? had he dealt with the reporter before? was he familiar with the reporter's discretion in other news stories?

An absolute bill is also required because, judges—as we discuss later on—have been ingenious in evading the clear intent of state shield laws. A qualified bill concept would only encourage more such evasions by the judiciary.

An absolute shield would also terminate the tendency of courts and prosecutors to treat the press as a readily available investigative arm. We believe that Congress must tell all governments forcefully and clearly that the press is not a cooperative fourth branch of government. A qualified bill would still invite governments to push for unpublished information, to tie reporters up in long and expensive litigation, and to harass some newspapers into cooperating in investigations.

What would happen if all newsmen had the privilege to refuse to disclose confidential sources and unpublished information? In those few states which have broad shield laws, there has been no reported adverse reaction either by law enforcement agencies or the courts. In fact, the federal government operated quite effectively until recently without forcing news reporters to disclose information.

In addition, the Bureau of Labor Statistics reports that there are currently about 350,000 attorneys in the nation, about 320,000 physicians and about 280,000 clergymen who, of course, have the privilege. Thus, about 900,000 citizens already have the privilege of confidentiality in almost every state and in federal proceedings. The Bureau estimates a total of 112,000 working news editors and reporters in the country—and one could hardly argue that the Republic is going to crumble if these 900,000 persons are raised to a million.

Furthermore, we note that nowhere in the Constitution is there a specific protection accorded to attorneys, physicians and clergymen. By contrast, the First Amendment specifically mentions the press.

We believe it is absolutely critical that this newsman's privilege be preemptive in approach. We believe that Congress has the power under Sec. 5 of the 14th Amendment to extend the journalist's privilege to all state executive, legislative and judicial proceedings, under Congress's power to implement the principles and concepts protected by the First Amendment. We are backed in this appraisal by two eminent Constitutional experts of differing approaches, Professor Paul Freund of Harvard, and Professor Archibald Cox, former Solicitor General of the U.S. and now, once again, a teacher at Harvard.

We feel most strongly about the preemptive approach. The danger exists at the state and local level as well as with the federal government. We think it would be a pyrrhic victory for the Congress to pass a shield law which covered only one of the 51 jurisdictions where newsmen may be subpoenaed.

We offer the commerce clause power as an additional jurisdictional authority for the preemptive approach. In this day of instant communications, a news event anywhere is instantly sent across the globe. Most newspapers have some circulation across state lines. Thus, it is clear that a restriction on the right to know about a public event in California deprives citizens in Wisconsin of their rights to know about news developments.

The tendency of state court judges to evade the clear intent of many existing state shield laws is evidence of the need for both an absolute bill, as we noted earlier, and a preemptive bill.

In the Farr case, the lower court held that a news reporter, given statutory protection to shield confidential sources, loses that protection if he ends his news employment. This means that a newsman, after obtaining information, must remain in the news business for at least the period of the statute of limitations or else he may risk jail.

An appellate court in California went even further. It ruled that the California state legislature had violated the inherent constitutional power of the courts to protect the integrity of their own processes and that a shield law could not stop a state judge from attempting to elicit Mr. Farr's confidential source.

This decision, if adopted by courts in other states, could void state shield laws any time a reporter is summoned to give evidence in a criminal or civil trial.

Kentucky took another approach. Its courts ruled that Paul Branzburg's source on drug abuse ceased to become a "source," but became a criminal when he was observed making hashish.

The Maryland Supreme Court said that a newsman who poses as an average citizen has no shield law protection because he did not formally announce that he was a news reporter.

And New Jersey ruled that its statute, protecting confidential sources (recently amended), was not intended to cover confidential information.

Without a preemptive law, citizens in one state will have more rights to know about the news than citizens in an adjoining state, and we will be engaged in a long, expensive and debilitating guerrilla war with the state courts to ensure that state shield laws are properly enforced.

III. CONCLUSION

For these reasons, we urge the Congress to reaffirm first amendment rights, assuring the public of a free flow of information by granting a statutory privilege protecting confidential sources of published and unpublished information and the content of all unpublished information from any scrutiny by any agency of the federal or state governments.

Senator ERVIN. We will stand in recess until 2:30 when we will resume the meeting in the same room.

[Whereupon, at 1:30 p.m., the committee recessed, to reconvene at 2:30 p.m. of the same day.]

AFTERNOON SESSION

Senator ERVIN. Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness is Mr. James J. Kilpatrick, columnist for the Washington Star syndicate.

Senator ERVIN. I am awfully sorry I was late getting back, but I have to run from morning till night these days and don't get half around to my work as it is.

I want to welcome you to the committee and express our deep appreciation for your willingness to come and give us the benefit of your views in respect to what I think is a very serious problem.

STATEMENT OF JAMES J. KILPATRICK, COLUMNIST, WASHINGTON STAR SYNDICATE

Mr. KILPATRICK. Mr. Chairman, I had an opportunity only a moment ago to read your opening statement this morning. I think you said just about everything I had intended to say.

The apprehensions expressed by you are the same as mine. Nevertheless, I had prepared a statement and with your permission I may as well go ahead and read it.

Senator ERVIN. Thank you. I am certainly anxious to hear your statement. I haven't had an opportunity to read it yet. I don't know a more eloquent man than you.

Mr. KILPATRICK. I started into newspapering the summer I was 12, as a copyboy for the *Oklahoma City Times*. After graduation from the University of Missouri's School of Journalism in February 1941, I went directly to the *Richmond News Leader* as a general reporter. In the summer of 1949, I succeeded Dr. Douglas Southall Freeman as editor, and remained in that position until my resignation at the end of 1966. Meanwhile, in 1964, I had begun to write my syndicated column, "A Conservative View." The column, which now appears in some 260 American newspapers, is still my principal labor, though I am under contract as a conservative commentator to both the Columbia Broadcasting System and its Washington outlet, WTOP-TV. I write fairly extensively for magazines.

I mention these biographical notes only to suggest that I speak this afternoon from a background of 40 years of newspapering, 32 of them as a working professional.

As such, I know, of course, the importance of being able to protect a newman's sources. I once exposed a conflict of interests on the part of a high Virginia State official, involving State purchases from a company he continued to own in private life. I could not have broken that story if I had not been able to promise protection to my original source.

Again, I did a series of stories exposing the ownership of slum property in Richmond. While much of this was based upon digging through public records, the original lead came from an employee in the tax assessor's office; and I would not have had the story if I had not promised to protect his identity.

Still again, I helped to break a story involving the political appointments of certain "honorary city sergeants." The lead came from a sheriff's deputy who would have been fired if I had not been able to pledge that I would keep his identity unknown.

None of the three stories was of monumental significance, but they had this in common:

First, each of them was the product of a tip or a leak from a source whose identity had to be kept in confidence.

Second, each of these leads demanded something more than a mere tip: each demanded a followthrough with serious investigative journalism.

Third, each of the stories involved activities that the people had a right to know about.

And there is a fourth point: I doubt that today, in the uncertain climate that now obtains, I could break any one of the stories. My sources would be afraid to talk.

The examples I cite from my own recollection are in some ways poor examples. Most of my colleagues could describe news beats far more dramatic, and far more significant. And yet the three stories, forgettable as they were, may be useful examples for the purposes of the subcommittee's inquiry—for these are not exceptional examples. They are entirely typical examples of the work that is done, day in and day out, by newspapers large and small throughout the Nation. In the familiar simile, we of the working press are watchdogs. Our function is to roam around the home place, growling. Right now, under the chilling impact of the *Caldwell* decision, we are pretty well chained in our kennels. This is what the controversy over shield laws is all about.

Now, for reasons I want to get to in just a moment, I am opposed to the shield laws pending before you. I believe the situation, in time, if we are patient, will cure itself. You made the observation in your own statement that we ought to look unto history. I don't like the harassment of the past 2 or 3 years, but I have been around long enough to have learned the wisdom that was chiseled in the philosopher's stone: "This, too, shall pass away." My hunch is that we are experiencing no more than a muscular spasm in the body politic. It is painful, but it will subside. We will err, I believe, if we embark upon a cure that could be worse than the disease.

I oppose the pending shield bills for these reasons:

First, the statutory approach in itself is fundamentally wrong.

Second, the proposed statutes I have seen at best raise serious doubts that stem from their drafting; at worst, they are probably unconstitutional.

Third, these various proposals—especially the proposals having to do with absolute or unconditional privilege—involve the risk of head-on collision with the rights of other persons under the sixth amendment. This was one of the points you made in your opening statement.

On the first point: I do not mean to equate the Congress with the divine ruler of our universe, no such parallel having been visible lately, but I believe we ought to recall the wisdom of the Good Book. The Lord giveth, we are told, and the Lord taketh away. The statute that is passed is the statute that subsequently may be repealed. If we of the press yield to temptation—if we ask and get a statutory shield law, make such a law our chief protection—we will find ourselves mousetrapped one of these days. We ought not to rely upon a statute, which may prove as ephemeral as the winds. We ought instead to rely upon the Constitution itself, which is a rock. I am aware, of course, that in *Caldwell* the rock proved not as solid as we had hoped, but *Caldwell* is not necessarily the last word. If I read correctly between the lines of the concurring opinion by Mr. Justice Powell, the cases were decided not by a close vote of five to four, but by an even closer vote of, say, four and nine-sixteenths to four and seven-sixteenths. Since *Caldwell*, we fettered watchdogs have raised a fearful howl, and judges are not deaf. I believe that as time passes, the courts will acquire a much better understanding of the problem as we newsmen see it.

You have been regaled, I know, or you will be, with accounts of judges who refuse to understand. The most spectacular of these accounts has to do with the case of William Farr. I venture this observation, that when my colleagues stand upon this case, they stand upon quicksand. From what I know of this case, Mr. Farr was not engaged in serious investigative journalism; he was engaged in sensationalism. If I may borrow from another field of first amendment law, his story was utterly without redeeming social importance. Mr. Farr is now in the untenable position of a man who first conspired in contempt and now condones perjury. His conduct, in the midst of the Manson trial, in my own view, impresses me as a flagrant violation of ethical journalism. To defend that conduct in the name of "the people's right to know" is to make a mockery of that concept.

If we leave these decisions in the hands of the judiciary, we of the press will win some and lose some. We will lose some we ought to win, and we will win some we probably ought not to win, but we will be in a far healthier position than we would occupy if we put our first reliance in a statute, and not in the Constitution itself.

But if you gentlemen are suffering the legislative itch, and are absolutely determined to scratch it, I would suggest that you ponder long and slowly over some long and serious problems of statutory drafting.

Who are the "persons" who could invoke the proposed privilege? In Mr. Schweiker's S. 36, such a person is a person who occupies the capacity of:

> A reporter, editor, commentator, journalist, writer correspondent, announcer, or other person directly engaged in the gathering or presentations of * * *.

Of what? Of "news." I have been in this wonderful business all my life, and I have yet to see an altogether satisfactory definition of "news." It is like music, or art, or beauty. In the final analysis, we live by the rule of Humpty-Dumpty: News is what we say it is, and neither more nor less. We share the positive ambivalence of Mr. Justice Stew art, searching for obscenity: He knows it when he sees it. As a key word in statutory drafting, "news" is not much to lean on.

In Mr. Schweiker's bill, these persons must be engaged in gathering or presenting this news for "any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station or network, or cable television station."

This is all very well, so far as it goes, but it leaves out the freelancer, the person contemplated by Mr. Hartke in Senate Joint Resolution 8 who is "independently engaged in gathering information intended for publication or broadcast." The Schweiker definition also excludes a couple of persons embraced by Mr. Cranston in S. 158. These are persons engaged in communicating by way of "book" or "pamphlet." Mr. Cranston's "persons," incidentally, are simply persons—they could be corporations—"who gather, write, or edit information for the public or disseminate information to the public."

Such information, under the Cranston bill, is defined to include "any written, oral or pictorial news, or other material," and hence we are back at a starting point.

The Weicker bill, S. 318, tries harder. Here we are concerned with granting certain protection to "a legitimate member of the professional news media." The class is to include:

> Any bona fide "newsman," such as an individual regularly engaged in earning his or her principal income, or regularly engaged as a principal vocation, in gathering, collecting, photographing, filming, writing, editing, interpreting, announcing, or broadcasting local, national, or worldwide events * * *

And even here, Mr. Chairman, I am brought up short. I can understand the filming, interpreting, or broadcasting of an event, but I do not recall an event that could be conveniently gathered, collected, written, or edited.

Mr. Weicker's S. 318 goes on to define the news media in which these events are to be published or transmitted. These include, for example: "any newspaper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least 1 year, or has a paid general circulation and has been entered at a U.S. Post Office as second-class matter * * *," et cetera.

Now, I appreciate Mr. Weicker's purpose. He is apprehensive at the prospect of abuse of the absolute and qualified privileges his bill would create, just as you expressed in your opening statement, and he is trying to narrow their application. But at this point, it seems to me, the gentleman falls into error. For what the authors of these several bills are attempting to do is to implement the right to a free press protected by the first amendment. And when you make a law that fails to apply to the pamphleteer, the writer of books, the high school editor, or the writer of a one-shot manifesto, why, sirs, you are making a law abridging the freedom of the press. My Constitution tells me that Congress shall make no such law. In the process of including this, and excluding that, of defining the legitimacy, if you please, and bona fides of newsmen, you march into swamps where I think you ought not to go.

Finally, on my third point, I respectfully submit that none of the human rights protected by the Constitution is an absolute right, and I believe it would be error to attempt to create one. Among these rights I include the first amendment right of free speech and free press. Mr. Justice Black, I know, used to insist constantly, in his humble Alabama fashion, that his mind lacked the sophistication to read "no law" as meaning anything but "no law." I was often tempted, when he uttered this pious nonsense, to rent myself a sound truck, to park it beneath the Justice's bedroom window down in Alexandria and at 2 o'clock in the morning to deliver myself, at full volume, of a critique of Mr. Justice Black's astounding opinion in the matter of 18-year-old voting. My freedom of speech, thus abused, would have lasted only long enough for the Justice to have summoned the Alexandria cops.

Manifestly, there is no such thing as absolute freedom of speech or of the press. There never has been, and there never ought to be. Our rights, as journalists, are precious rights, but they have to be balanced against other precious rights. In the context of our discussion this afternoon, I suggest that another such precious right is spelled out in the sixth amendment:

In all criminal prosecutions—and I pause to emphasize that word "all," by way of suggesting that "all" includes more than Mr. Weicker's limitation to prosecutions for "murder, forcible rape, aggravated assault, kidnaping, airline hijacking, or where a breach of national security has been established." The sixth amendment, as you gentlemen, of course, will know, says that:

In all criminal prosecutions, the accused shall enjoy the right to—you mentioned some of this in your opening statement—and here I would call your attention to only four of the rights then enumerated. These are:

(1) The right to trial by an impartial jury.

(2) The right to be informed of the nature and cause of the accusation.

(3) The right to be confronted with witnesses against him.

(4) The right to have compulsory process for obtaining witnesses in his favor.

It requires no great or vivid imagination, Mr. Chairman, to hypothesize situations in which an absolute shield law would collide with these sixth amendment rights. On that fourth point alone, involving the right of an accused to have compulsory process for obtaining witnesses in his favor, let us suppose that a murder is committed by firearm. A reporter, in good faith, writes: "Police sources said the bullet was so badly shattered that its identification would be impossible." Suppose, then, that we come on to trial, and the defense is surprised by ballistics evidence. It would be a poor defense lawyer, indeed, who would not instantly seek compulsory process against that reporter. "Who were these 'police sources,' " he would ask, "who told you the bullet was so badly shattered it could not be identified?" The reporter who then sought protection behind a shield law, saying he had promised not to identify the officers, or that he would never get any confidential stuff again if he broke his promise, would be inviting a directed acquittal for the accused, or a time in jail for himself. Perhaps both.

Mr. Weicker recognized this conflict in his remarks to the Senate on January 11, just as you did this morning. He and his cosponsors, he said, were seeking to balance "two fundamental rights—your right to your neighbor's testimony when you're accused, versus your right to the news."

My objection, in part, to Mr. Weicker's bill is that by limiting the class of criminal prosecutions in which a newsman's testimony might finally be compelled, he violates the sixth amendment's specific reference to "all" criminal prosecutions. And, of course, I object that in his effort to limit the privilege to persons who are engaged "in the ongoing business of substantial, professional news reporting," he abridges the rights of persons who may be engaged in the intermittent business of insubstantial, amateur reporting. If the right we are talking about exists at all, it applies to the most mischievous penny tattler as well as to the *New York Times*.

In criticizing the bills before you, I do not intend for one instant to attack the purpose of their authors. The purpose is altogether admirable—to remove inhibitions to the free flow of news, to protect the people's right to know of crime and corruption and malfeasance in public office, to see that the watchdogs are let out of their kennels. I am as dedicated to these purposes as any Member of the Congress, or any member of the press. I simply doubt that shield laws are a proper means to obtain the desired end.

One more thought and I am done: While you are investigating this general field, I believe your subcommittee could perform a better service by looking into the ominous growth of court orders purporting to impose a direct prior censorship or blackout on the press. I have in mind the incredible order entered by District Judge E. Gordon West in the case of Larry Dickinson and Gibbs Adams, reporters for the *Morning Advocate and State Times* in Baton Rouge. I have also in mind the order laid down last week by a State judge, Judge Samuel M. Bowe in Grant's Pass, Oreg. Under pain of contempt, Judge Bowe sought to prohibit the Grant's Pass *Courier* and the local radio and television stations "from reporting any opinions or disclosures of information in this case—a pending murder case—"which are not matters of public record." This indefensible and autocratic procedure, in flagrant violation of first amendment rights, cannot be tolerated. In my own view, it represents a far greater danger, if left unchecked, than the danger that stems from demands that a reporter disclose his sources of information.

Let me thank you for your courtesy, and invite your questions.

Senator **Ervin**. You have certainly given us a most eloquent, and I think wise, statement.

I think it is a great tragedy that the majority of the Supreme Court didn't follow the decision of the court of appeals in the *Caldwell* case which expressly recognized that in this area you have two interests of society involved: One, the interest of society in knowing what is going on in the country, and also the interest of society in the prosecution of crime.

Mr. **Kilpatrick**. Mr. Chairman, I think every working newspaperman of my acquaintance was keenly disappointed at the decision in *Caldwell*. Most of us, I think, expected to win that case; and it was a bitter blow.

Senator **Ervin**. I think the circuit court opinion was one of the finest judicial opinions I have ever read.

Mr. **Kilpatrick**. I didn't see how it could be overthrown.

Senator **Ervin**. I didn't either. At that time I was adamantly opposed to any shield law being devised by Congress because certainly

I thought the men who drafted the first amendment had better linguistic skills than anybody I knew of in the Congress of the United States at this time.

But, unfortunately, we did receive that decision.

Like you, I have the feeling that as time passes by, the Supreme Court is going to get away from that decision one way or another and go back to the circuit court decision.

Mr. KILPATRICK. I believe it will have to happen, sir. The dissenting opinion was so persuasive that in the course of time, given another set of facts, it will be sustained—though basically I thought the *Caldwell* facts were as good a set of facts as we could get.

Senator ERVIN. I did, too. I thought they were confused by the *Branzburg* case where the newspaper reporter had personal knowledge of violation of the law.

I think you've given us the finest dissertation I have heard on the question of absolutes. It is quite in harmony with the spirit of the closing words Justice Hand used in concluding his words in his famous lecture to the Harvard Law School. He closed by enjoining the law students "to take up arms against the theory of absolutes and to give them no thought."

This is a very—as your analysis of several of the bills shows—this is a very difficult field in which to find an adequate phraseology.

Mr. KILPATRICK. This is your problem, sir. If you start restricting the class of "newsmen," that you are abridging the freedom of the press you are supposed to protect. The difficulty you get into there is this: I don't think there is any way of restricting the class. If there is going to be a bill that is to be wide open; it must apply to the people who write for the so-called underground press as well as it applies to everybody else.

Senator ERVIN. There is a rollcall vote in the Senate. We will get back just as quick as we can. I thank you, Mr. Kilpatrick, for your thoughtful and eloquent contribution.

[Short recess taken.]

Mr. BASKIR. Mr. Chairman, our last witness is Mr. Earl Caldwell, correspondent for the *New York Times*.

Senator ERVIN. I want to welcome you to the committee and express our deep gratitude for your willingness to come here and give us the benefit of your views in the area in which you have suffered a great deal. I think from the result of your experiences you know much about this, and I also want to apologize for not being able to get to you earlier today.

STATEMENT OF EARL CALDWELL, REPORTER, NEW YORK TIMES

Mr. CALDWELL. Mr. Chairman and members of the committee, I first want to thank you for this opportunity to be heard here today. During the course of these proceedings you will also hear from many of my colleagues along with many publishing and broadcasting executives. Many of them are in a better position than myself to discuss with you the dangers that face the press in America at this time. So I should like to make it clear from the start that my views are those that come strictly from the vantage point of a working reporter.

I have given a great deal of thought as to what I should say. I have thought of the warnings that I might sound. I have thought too of the great American leaders that I might quote in order to better make these points. But somehow, Mr. Chairman, none of that seems appropriate. In recent weeks and months, from virtually every section of the country, those warnings have been sounded again and again. And as for those quotes that state so well the importance of a free press in our society, you may have offered some of them. So I shall not waste your time. I come here Mr. Chairman, to say, as many others surely will, that the press needs your help. I come to tell you that the interference of Government is so great at this time that many of us are no longer able to do our work.

Just about a year ago, on another cold February day, I was accompanied by an attorney to Washington. Then, as now, we came seeking protection. On that trip of a year ago, we went before the Supreme Court of the United States. We were confident then and firm in our belief that we were asking nothing that was not guaranteed in the Constitution. Unfortunately, the Court did not agree. And so we are here again. Today you are hearing from me. In another day, I understand that you will hear from Prof. Anthony Amsterdam of Stanford University, the attorney who represented me in the litigation that went before the High Court. I will leave to Professor Amsterdam the recommending of solutions because he is far better equipped to handle that. But I should like to use the rest of my time to tell you something of my experiences in attempting to report on the activities of the Black Panther Party in the latter part of the 1960's, and how interference by agents of the Federal Bureau of Investigation and unreasonable demands by officials of the Justice Department brought my reporting to a halt.

During 1968, I made a number of trips to the west coast, primarily to report on the Panthers. And by the spring of 1969, the organization had grown so large and was building so much influence—particularly among the youth—that I was reassigned by the *New York Times* from New York to the newspaper's San Francisco office. That reassignment was not made because the *Times* did not have competent correspondents in San Francisco. In fact, the correspondents there at the time, Lawrence Davies and Wallace Turner, were among the most distinguished reporters in America. But at that time, suspicions and fears among many segments of the black community was such that white reporters were unable to gain access to effectively report on the activities of militant black organizations. For me, being black was certainly an advantage, but that alone did not give me immediate access to the Panthers. It took months to build relationships and to convince contacts that I was not an undercover agent, but that I was simply a reporter whose only interest was in telling a story that had not been told because there was no one to tell it.

In the summer of 1967, nearly 2 years before I went west to cover the Panthers, I traveled the country reporting and writing of the riots that were sweeping black communities. I traveled with and wrote a great deal about the men who emerged as the spokesmen of that black discontent. And in the course of that, I moved through the black neighborhoods across the country, from Roxbury in Boston to the south side of Chicago and Watts in Los Angeles. Along the way, I found many blacks fed up with the system and angry and bitter about a press which they felt had a history of treating them unfairly. But despite those feelings and although they were reluctant, they were still willing to talk with reporters and to give them a chance to have an up-close look at things as they were. I was able to file many, many stories on the people and the life on the black side of those towns. Those stories were not always displayed in the newspaper as I might have liked, but they were all there. Then came my work with the Panthers and my encounters with the FBI and the Justice Department, encounters that finally led to my being held in contempt of court when I refused to participate in secret meetings to discuss my sources and information that they had given me.

My first meeting with the FBI with regards to reporting on the Black Panther Party came in September of 1968, after I had written about as sizable cache of weapons that I had seen in an apartment occupied by party members. I had just returned to New York when agents called me at *The Times* and requested additional information. I informed them that all of the information that I had had been published in *The Times*. But they persisted. They even made an unannounced visit to the city room in West 43d Street in midtown Manhattan and called me out into a reception area and blocked my path when I said again that there was no additional information. Finally, I had to call out another reporter to free me from the agents.

By the middle of 1969, my credentials were so established with the Panthers that I was able to report freely on almost every aspect of their operation. I wrote of the breakfast program they were operating for black children and the politics that were involved, long before most other reporters even knew that it existed. I wrote with some detail of weapons they owned and later how they were beginning to attract wide supoprt in various sections of both the black and white communities. I wrote too of their ideas of what the society should be—not just shallow pieces taken from brief interviews, but in-depth stories that were drawn from hours and hours of sitting and watching and listening. Listening not from a distance, but from inside their private offices, offices where weapons stood in corners and where sandbags lined the walls and huge metal plates covered the windows.

Of course, there were times when I came into confidential information. But mostly, it was out front. I wrote my own stories and I was accountable to only my editor. I tried as best I could to tell an honest story of what the Black Panther Party was all about and who was involved at all levels.

In December of 1969, when there were numerous and often violent confrontations between the police and the Panthers, I wrote a major piece in which I tried to detail what was happening to the party and its ideas. The article pointed out that the Panthers themselves made no attempt to mask their revolutionary doctrine and in the piece I quoted David Hilliard, then the party's national chief of staff, as saying that the Panthers advocated the very direct overthrow of the Government by way of force and violence. A day after that story appeared in the *New York Times*, I had a call from the FBI and I again explained to them how delicate my relationship was and how improper it would be for me to even think of participating in such a secret meeting. But the agents would not accept that argument. They began to call daily and those calls went through many weeks. There was even an occasion when I was in another city on another assignment that they contacted me at my hotel. Of course, all of this was a concern to me. I feared then that if my sources even suspected that the agents were calling me that I would lose them. After consultations with the bureau chief, my phone calls were screened. But to counter that, the FBI had women call and ask my whereabouts. This continued through the following month, January, until near the end of the month an agent told an employee at *The Times* San Francisco bureau to inform me that they were not going to fool around any longer, that if I did not cooperate with them, that I would be in court. That conversation took place on Friday and the following Monday a subpena was issued for me to appear before a Federal Grand Jury in San Francisco. The subpena not only demanded my appearance but it demanded that I bring along tape recordings, records of conversations, notebooks, and other documents covering a period of some 14 months.

Most of what happened after that is history now, a history in the courts known as the *Caldwell* case and one that has already led to a number of journalists being jailed.

As for myself, my reporting on the Black Panther Party ended the day the first subpena was issued. It was not ended by The New York Times but rather, it was ended by the Justice Department and solely, I believe, because I refused to meet secretly with agents of the FBI and discuss in private with them information that had come to me through my hard-earned sources.

Today as a reporter I keep no files. I no longer use a tape recorder but still I have found source after source suspicious that anything told to me, a journalist, will end up in the hands of some investigative agency. And I am not alone. Reporters across the country had told me that they are having similar experiences.

A few weeks ago, Mr. Chairman, I appeared before a House committee that has begun to look into this same issue. At that time I read a statement prepared by myself and Robert C. Maynard, a distinguished editor at *The Washington Post.* We spoke then of how difficult it was for a reporter to gain the confidence of a group such as the Panthers and we asked the question: Given the rulings of the court, would I or any reporter now stand a chance of learning what they were really all about? "Hardly" was our conclusion. And we asked another question: Can democracy afford such a circumstance? For example, Mr. Chairman, is there a Black Liberation Army? And if there is, is its mission to kill policemen? Who are they and where are they? We may never know.

As I said in my testimony before the House committee, the reason I am here is to say, for whatever it may be worth, that the best ideal of democracy as fulfilled in the first amendment needs your protection more than ever before. It isn't so that *New York Times* reporters can move freely, Mr. Chairman. It is so that ideas can move freely among a free people, so that we can all make the judgments we must be able to make if democracy is to remain a living ideal.

Senator ERVIN. I think your statement and your experiences show one of the great values of the first amendment. The first amendment established freedom of speech and freedom of the press so that people might voice their discontent with the existing order of things and so that those in authority could remedy things which needed to be remedied before there is any kind of a revolution. In other words, if the first amendment is observed and people have a feeling that their discontents will be attended to by those in authority, there is no place for violent revolution in this country.

But there are some people who are reluctant to express their discontent. As you found in your reporting from the black communities in places like Watts and Chicago and Roxbury, these people were not willing to express openly their discontent. But they were willing to confide their feelings to you and you in turn were able to write newspaper articles which brought their discontents to the attention and knowledge of the people who could do something about it. That is one of the great purposes I think of the first amendment, and it shows why a newsman ought to be allowed to protect confidential sources of information.

Now, then, you have organizations like the Black Panthers and other organizations of that kind in this country, and it is essential, it seems to me, for society to know what the objects and aims of these organizations are. They are not going to complain themselves, and the only way that the country can find out what they are thinking and preparing for is through the agency of reporters who have gained their confidence and by reason of that are able to know exactly what they are about.

I think that this is—your paper and your experience is a magnificent example—I hate to use the word "magnificent" in respect to such an unhappy experience—but it is certainly a magnificent illustration of one of the fundamental purposes of the first amendment.

There is no doubt that a reporter working in the area in which you work and especially one who deals with a group such as the Black Panthers is going to lose his sources of information, if he is required to go before a grand jury or petty jury or investigative body and testify about them. Even if he is not required to testify after he gets there, the mere fact that he is compelled to go, even though it may turn out that he reveals nothing about his sources, must raise their doubts. Still his sources of information are destroyed, aren't they?

Mr. CALDWELL. I am in complete agreement with what you say. It makes no difference what information you have. That is why I think in the *Caldwell* case the unfortunate thing was the Government never even attempted to make any showing that I had any information whatsoever that would be of any value to them. But they still insisted that I go before the grand jury, knowing full well that it would be destructive on my ability to continue to function as a reporter.

Senator ERVIN. I want to commend the courage you displayed in jeopardizing yourself by sticking up to what you conceive to be the ethics of a news gatherer.

I maintain the judges ought to have a wisdom as well as knowledge. I have been distressed by the willingness of judges to try to punish news gatherers because they stuck to their code of ethics.

We had a great old judge down in my county when I first started practicing law many years ago when Prohibition was the law of the land. They had caught one of my clients running a little still—a 20-gallon copper still. They caught him redhanded. So when they came to court the prosecutor told me the only thing I could do was plead him guilty and ask the judge to deal with him as gently as possible. In those days, the prosecuting attorneys were on the fee system and the more people convicted, the more compensation. We had a very enterprising prosecuting attorney. In any case he tried, he sought out three or four other violations of law so he could indict three or four other people for violations. The longer the court stayed in session the bigger the docket grew. My client was Benton. The prosecutor called him around to the witness stand and asked him where he got that still, and Mr. Benton said, "I ain't going to tell you." He was one of these mountaineers who had a lot of courage like you displayed. He kept saying "Where did you get that still," and Benton kept saying "I ain't going to tell you." Finally the prosecuting attorney appealed to the judge to make him tell and the judge said, "Well, Mr. Benton, when you said you weren't going to tell the prosecuting attorney where you got the still, I assume you meant you would rather not tell him," and he said, "That is right, judge, but I ain't going to tell him nohow."

Then the prosecuting attorney appealed to the judge to put Mr. Benton in jail until he told where he got his still, and I will never forget what the judge said because it showed he had wisdom as well as knowledge. He said, I think everybody needs a code of ethics to get through this troublesome world, and he said, it appears that Mr. Benton has devised himself such a code. According to his code of ethics, he thinks it is wrong for him to tell on somebody else. He said it might not be as enlightened a code of ethics as yours or mine, but I am not going to punish him. I am not going to send him to jail because the greatest injury I can do to any man is to tear down the code of ethics by which he lives, even though I may not fully approve of it. So the judge went ahead and gave him a sentence for the still, but didn't send him to jail for contempt of court.

I have often thought about these judges sending newsmen to jail for not disclosing the source of information; if they could exercise a little wisdom like this judge in North Carolina many, many years ago, they would be better off.

Mr. CALDWELL. I would agree with you. I would hope it would be true. I would also add that it would be nice if it would be illegal for judges to send newsmen to jail.

Senator ERVIN. In other words, Congress would have to pass laws because judges don't exercise the wisdom they should.

Senator GURNEY. Mr. Caldwell, I wonder if you could amplify a little bit upon what happened after the subpena was issued and your communication was cut off with the Black Panthers. Could you tell us what happened?

Mr. CALDWELL. The original subpena was issued in February 1970. I think it was several months later before I talked with any member of the Black Panther Party. At that time, they were aware of what my position was and this matter was in the courts; it was covered by the press. I am sure they respected and appreciated my position.

But I think that the problem was that no matter how they felt about me, that they then knew it was dangerous business in dealing with newsmen and from the day the subpena was issued—and it was some months later before I made various trips back to the party office—I never again had the kind of freedom to roam around that I had originally. I think that what changed all that was that they knew then that the Justice Department or the FBI or whoever might be investigating them would come to journalists to get information. I don't think it had ever occurred to them previously.

Senator Gurney. Did you seek any of them out after the subpena was issued and the problem was disclosed?

Mr. Caldwell. No, I didn't. The subpena also required me to sort of drop my work and become involved in trying to build a defense; hoping to keep me out of jail.

Senator Gurney. Did they offer information to you that time? Did they come to you voluntarily and tell you stories and things?

Mr. Caldwell. When I was covering them full time, I used to make a point of either calling them or going around to their office almost daily. Hardly 2 or 3 days would go by when I didn't have contact with them, when I wasn't looking into some aspect of this operation.

Senator Gurney. Did you seek to do that after the subpena was issued?

Mr. Caldwell. As I say, there was one reason that I didn't do it was because I was too involved—as a matter of fact, I don't think I wrote any stories for the *New York Times* or very few stories in the next several months because of that. Also their position from the day my subpena was issued, their position, with regard to not just myself, but to all the press changed. I know that ABC television in New York had sent a crew out to California that was about to do a documentary and they did not let them proceed with that. There were other reporters wanting to do stories too and they insisted that they bring in sworn statements from their employers and they made demands on them about things they would do with whatever information they got.

Their attitude changed and also the relationship of reporters changed and no one had the freedom, including myself. At that point, it wasn't so much their talking to me, because they had press conferences and things and you could always talk to them. Many times in covering organizations such as the one we are talking about here, it is the news they volunteered but rather it is being able to have the access to get in close and the things you can pick up sometimes without asking, being around and being able to observe up close.

Senator Gurney. Rather than having meetings and social gatherings——

Mr. Caldwell. Just being able to get into the insides of their offices and engage them in conversations that were not at the press conference level, where there was, for a lack of a better word, I would say—sometimes press conferences get to be a showy kind of thing—where you would get beyond that to serious kinds of conversations to find out whether people are sincere about what they are saying, if they really have the ability to deliver and how they go about their work and sometimes see who is doing the work, is the guy who is doing the talking really the guy who is making the decisions. Sometimes it may take 6 or 8 weeks to bring together one piece because it is all the bits and pieces that you are able to pick up along the way that enable you to do that.

I am sure today, had there been no subpenas, had the Supreme Court ruled the other way last June, I don't think I could go out in the street and say I wish the Black Liberation would come to me and automatically they would and I would have access to everything they are doing. But at least you might be able to dig around and pick up individuals and look inside at some of the things.

Senator GURNEY. Have you sought their confidence at any time recently?

Mr. CALDWELL. Unfortunately, I was sort of out of action for 2 years and in that time many of the people I had close relationships with have been sent to jail, some of them went out of the country, some weren't around any more, having separated themselves from this organization. Also, the Black Panther Party of today is largely different from the Black Panther Party of 1967, '68, and '69, their activities—yes, their activities are different and I would say that they are different.

Senator GURNEY. But your feeling is that it is still very difficult to communicate with them?

Mr. CALDWELL. It is not just with the Panthers. For example, several weeks ago I was in San Diego and I was attempting to do some stories about what it means to be black and be in the Navy at this point. There are a lot of things that are happening that we can see the ending of them, it may be a riot on the *Kitty Hawk* or sailors refusing to go on board the *Constellation*. So the reporting is to try to find out what causes these things.

But I found—and I was amazed because a lot of these fellows are very young—that as I was talking with one fellow in the course of an interview he said, "Didn't I see your picture in *Jet* Magazine?" He asked if it wasn't something about giving information to the Government about the Black Panthers. These fellows didn't want to say too much to me because they felt somone might come to me and I might have to give the information. Before, I could assure people that I am a newspaper reporter and that is all I am, that is the only reason I am here and the information you give to me stays with me. I can't make those kinds of assurances now because my last experience was, as you know, if you have the information, you must give it to investigators and if you don't you go to jail. I have to respond differently. I can say to my sources you can give the information to me if you want to, but you are taking a chance because I can't protect anything. There were a lot of documents—documents still often come to newspaper reporters and I don't feel free to keep files and records and tape recorders and many other things that are absolutely necessary for effective journalism because of these kinds of materials being subpenaed. They are now a liability. So the same kind of job isn't being done now and I would say further that if given the situation of 1967 that if we were at that point today, that I would doubt that *The Times* would have even assigned me to the west coast because I don't think I could have done any effective reporting at all.

Senator GURNEY. You mentioned something about the Black Liberation Army or what was it?

Mr. CALDWELL. It is near the end of the statement. I was referring to a group—I say "group"—that should have quotes around it because I don't have the information whether they do or do not exist—but there have been a number of recent shootings of policemen where the investigators have said they were shot by people who claim to be members of a Black Liberation Army. What I am saying is I don't know who these people are and I don't know if they exist. But if reporters had the kind of freedom we thought they had before this past June, some good reporters might be able to find out. They might be able to do a powerful public service and this is just one of the areas where we are going to lose this.

Senator **Gurney**. I will agree.

The question I was really asking is do you think there is any evidence that there is such a group?

Mr. **Caldwell**. I don't know, but I would say that I sincerely believe that had the Court not ruled the way it did last June, that I would be able to answer you differently, but information has dried up. Even within the industry, some people will want to deny that, but that is a fact and if you talk, and I would hope that you do, and I am sure you will, to reporters who are out in the streets and who are dealing with people in the communities, they will tell you that there is a difference now. There is a difference. It is remarkable. There was a fear and even a suspicion of even among the black reporters, as well as white reporters, back in 1967, during the riots and things, but we could stand our own ground and make serious arguments: "OK, you don't have to talk to us if you don't want to, but you can't call me a cop because I know what I am." But now the way the court ruled, all the time I was telling people that I wasn't a cop, that I wasn't an agent, I was in effect misleading them.

Senator **Gurney**. Thank you, Mr. Caldwell.

Senator **Ervin**. I just want to ask you a couple of questions. One is this:

Aren't you aware of the fact that the FBI and other law enforcement agencies have found that it is necessary for them to infiltrate organizations in order to get any real knowledge of the aims and activities of those organizations?

Mr. **Caldwell**. Yes, sir.

Senator **Ervin**. And so that is a recognition on the part of law enforcement officers that it is necessary to get in the confidence of someone on the inside in order to get any reliable information?

Mr. **Caldwell**. Yes, sir.

Senator **Ervin**. And that is precisely what you did in your reporting work in respect to the Black Panthers.

Mr. **Caldwell**. Yes, sir.

Senator **Ervin**. You mentioned the Black Liberation Army. I remember seeing statements in the press regarding this group about the time that this police officer was shot in New Orleans. Don't you think that the ability of either law enforcement officers infiltrating the group or the ability of newsmen to get information about it has been very much handicapped, if not destroyed by the decision in your case?

Mr. **Caldwell**. Absolutely, I would say absolutely.

Senator **Ervin**. I don't know whether you have had any experience in this field, but Mr. Kilpatrick who was here before you—he stepped aside on account of he was not feeling well—testified it was virtually impossible for the public to ascertain whether there is corruption on the inside of the Government unless a newsman had access to inside information and had an inside informant who was assured that his identity would not be made public.

Mr. **Caldwell**. I am in complete agreement with him. I heard his statement and I told him that I was in complete agreement.

Senator **Ervin**. But it seems to me to be a very justifiable statement because I know from my experience and observation that most all of the evidence of corruption in Government has come from news gathering who won the confidence of people on the inside who knew that these wrong things were being done.

Mr. Caldwell. Right.

Senator Ervin. And who would never have said anything if they had thought they were going to be exposed.

Mr. Cadwell. That is absolutely true.

Senator Ervin. I want to thank you for making a most convincing statement concerning exactly what happens to confidential sources of a newsman when he is given no protection by the courts.

Mr. Caldwel. Thank you.

Senator Ervin. You made a fine statement.

Mr. Caldwel. Thank you.

Senator Ervin. The subcommittee will recess to 10 o'clock in the morning and then meet in the caucus room of the Russell Senate Office Building.

[Whereupon, at 4:20 p.m., the meeting was recessed to reconvene the following morning at 10 o'clock.]

NEWSMEN'S PRIVILEGE HEARINGS

WEDNESDAY, FEBRUARY 21, 1973

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 318, the Russell Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin, Tunney, and Gurney.

Also present: Lawrence M. Baskir, chief counsel and staff director; Britt Snider, counsel.

Senator ERVIN. The subcommittee will come to order and counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness this morning is Senator Richard S. Schweiker.

Senator ERVIN. The subcommittee is delighted to have you present, and we appreciate your taking the time to come and give us the benefit of your views in respect to a very important question.

STATEMENT OF HON. RICHARD S. SCHWEIKER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SCHWEIKER. Thank you very much, Mr. Chairman.

I appreciate this opportunity to appear on a critical bill to protect the sources and confidences of news reporters.

I very much appreciate making this statement for the record, but I would like to summarize a few points, if I may.

Senator ERVIN. That will be satisfactory to the subcommittee. Let the record show that the entire statement will be printed in full in the body of the record after your oral testimony.

Senator SCHWEIKER. Thank you.

My personal shock over the recent sight of reporters being led to jail for refusal to disclose news confidences led me to make drafting of a strong newsmen's protection bill one of my first legislative initiatives of this Congress. My bill, S. 36, the "Protection of News Sources and News Information Act of 1973," was introduced on January 4, the first day of the new Congress.

Whatever specific language is finally adopted by this subcommittee, I feel deeply that news protection legislation should reflect four important principles:

(1) The news media must be protected from being utilized in any way as agents of the Government.

(2) The strongest possible Federal law must be enacted quickly to

lay to rest any possible doubt of the ability and right of newsmen to protect confidences obtained in their news gathering.

(3) Freedom of the press guarantees of the first amendment must be reaffirmed as the basic foundation of our form of government, entitled to paramount protection.

(4) Congress must fill the statutory gap alluded to by the U.S. Supreme Court last year when it rejected an inherent constitutional newsman's privilege but specifically referred to the power of Congress to enact a statutory newsman's privilege.

My bill addresses itself particularly to the danger of the media being pressed into service as an investigative arm of the Government through subpenas. My bill provides for an absolute privilege against any forced disclosure of confidential news sources, or information, by any investigative body, such as grand juries, governmental agencies, or even Congress. Under no circumstances should we dilute the independent role of the media by requiring the use of media sources and information by investigating officials. The media must be free to develop sources and information, and must be able to insure confidentiality to sources who otherwise would remain silent. It is ironic that Government has no problem allowing the identity of police informers to remain secret, for fear of "drying up" police information, but refuses to apply this same principle to the media.

Even though the use of governmental subpena power is generally limited to investigative reporting situations, we must not forget that the right and duty of the media to protect sources and confidential information should apply to all reporting situations. Without assurances from newsmen that any confidences can be maintained, many persons will no longer provide valuable information to the media, on many subjects, for fear of reprisals, unwanted publicity, loss of jobs, or other public interference with their families and their private lives. Once again the public's basic right to know is the loser.

Our entire governmental system, however, is made up of checks and balances. In weighing newsmen's privilege legislation, we must not lose sight of another constitutional amendment—the sixth amendment right to a fair trial. The historic right of the public to "everyman's testimony" must be evaluated, and is often cited as a principal reason for a qualified rather than an absolute newsman's privilege.

Once again, in my bill, I have recommended that consideration of any less than absolute privilege be confined to the actual trial of a specific case, after investigative work has been done. This insures that the news media can never be used for governmental "fishing expeditions."

In addition, I feel standards must be set by Congress to limit any required testimony of newsmen to only a narrow set of circumstances. And only when an overriding national interest is involved and not when newsmen have knowledge of a crime and they are the only ones who can shed light on this crime.

It can be dangerous for Congress to be too specific in outlining conditions that must be applied by the courts, and thus the language of a qualified privilege may have to be general. But the statutory language and legislative history combined should show congressional intent to seek a nearly absolute newsman's privilege, with exceptions being permissible only under relatively unique circumstances.

In my bill, a key condition before any testimony could be required is "a compelling and overriding national interest in the information." This type of language, coupled with requirements of (1) clearly evidenced relevance of the information sought, and (2) no alternative means to obtain the information, can provide a buffer to protect national interests. But the courts will be on notice that only rare and unusual circumstances would justify the use of these conditions. In addition, a heavy burden of proof must rest totally on the governmental body seeking news information in the rare case when a court should even consider such a "clear and compelling" national interest to be at stake.

My bill was limited to Federal bodies. However, I want to indicate my support for enactment of newsmen's privilege legislation at the National and State levels. If it is constitutionally permissible for Congress to impose such requirements on the States, I will support inclusion of States in our legislation. However, if we cannot legislate for the States, I hope our legislation will be strong enough to be a model for the States to follow suit.

In conclusion, I must confess I was surprised last year to discover that the freedom of the press of the first amendment did not provide protection from disclosure of news sources and information. I had assumed these freedoms were protected.

Two court opinions indicate the challenge ahead of us. Associate Justice White in the *Branzburg* case denying the basic constitutional news protection privilege last summer said we had the power to provide a statutory privilege. In a subsequent case, a Second Circuit Court of Appeals judge wrote, "It suffices to state that Federal law on the question of compelled disclosure by journalists of their confidential sources is at best ambiguous." It is our duty to clear up that ambiguity—on the side of the first amendment, and a vigorous, strong freedom of the press.

I thank you, Mr. Chairman.

Senator Ervin. Do you recommend that the same rule apply to congressional committees as would apply to the courts?

Senator Schweiker. Yes, I think that is true.

If we set a standard we can't have a double standard, and we should protect them with Congress the same way we protect them with the courts.

Senator Ervin. I just wonder as a pragmatic matter if it is as easy to get a bill through that applies to Congress as it applies to the court.

Senator Schweiker. I think you are right.

It might also be difficult, however, to have it upheld as constitutional by the courts if we didn't do it that way.

Senator Ervin. Well, I would think that we might prescribe rules of evidence for the courts without prescribing rules of evidence for the Congress.

I don't think the constitutional question would be very serious. That is just an offhand opinion.

Now, you favor an absolute privilege or do you favor——

Senator Schweiker. I divide the issue into two parts: In any grand jury proceeding, in any agency proceeding, in any congressional proceeding, the privilege is absolute. When you get a specific district or circuit Federal court or Supreme Court situation, then it is not absolute but very limited. First the court must judge that a newsman's material is relevant to a specific crime.

No. 2, it must be the only information that sheds light. They can't get that information from another source:

And No. 3, an overriding national interest must be involved.

So only if those three concurrent circumstances occur, can a judge decide that an absolute privilege must be waived. It must be a positive decision by a judge that those three circumstances appear that I feel can give us a balance between the first and sixth amendments to protect the national interest.

Senator **Ervin**. I think you have to sort of balance the two interests of society. Your bill undertakes to do that.

As the Circuit Court so well pointed out in the *Caldwell* case that the society has two interests involved: one is the interest of society in the prosecution of crime and the other is the interest of society in securing for the people the fullest opportunity of knowing what is going on in this country. I thought the Circuit Court in the *Caldwell* case balanced those two interests in an extremely wise manner and concluded in that case, that Caldwell should not be compelled to go before the grand jury.

Unfortunately, the Supreme Court didn't follow that very wise opinion of the Circuit Court, and that is the quandary we are trying to face in these hearings.

Do you have any questions?

Senator **Gurney**. No. I want to commend the Senator for shedding light on this important subject.

Senator **Schweiker**. Thank you very much.

Senator **Ervin**. Thank you very much, and your full statement will be printed in the record.

[The full statement of Senator Schweiker follows:]

Prepared Statement of Senator Richard S. Schweiker on S. 36, the Protection of News Sources and Information Act of 1973

My personal shock over the recent sight of reporters being led to jail for refusal to disclose news confidences led me to make drafting of a strong newsman's protection bill one of my first legislative initiatives of this Congress. My bill, S. 36, the "Protection of News Sources and News Information Act of 1973," was introduced on January 4, the first day of the new Congress.

Whatever specific language is finally adopted by this subcommittee, I feel deeply that news protection legislation should reflect four important principles:

(1) The news media must be protected from being utilized in any way as agents of the government.

(2) The strongest possible federal law must be enacted quickly to lay to rest any possible doubt of the ability and right of newsmen to protect confidences obtained in their news gathering.

(3) Freedom of the press guarantees of the First Amendment must be reaffirmed as the basic foundation of our form of government, entitled to paramount protection.

(4) Congress must fill the statutory gap alluded to by the U.S. Supreme Court last year when it rejected an inherent Constitutional newsman's privilege but specifically referred to the power of Congress to enact a statutory newsman's privilege.

My bill addresses itself particularly to the danger of the media being passed into service as an investigative arm of the government through subpoenas. My bill provides for an absolute privilege against any forced disclosure of confidential news sources, or information, by any investigative body, such as grand juries, governmental agencies, or even Congress. Under no circumstances should we dilute the independent role of the media by requiring the use of media sources and information by investigating officials. The media must be free to develop sources and information, and must be able to insure confidentiality to sources who otherwise would remain silent. It is ironic that government has no problem allowing the identity of police informers to remain secret, for fear of "drying up" police information, but refuses to apply this same principle to the media.

Even though the use of governmental subpoena power is generally limited to investigative reporting situations, we must not forget that the right and duty of the media to protect sources and confidential information should apply to all reporting situations. Without assurances from newsmen that *any* confidences can be maintained, many persons will no longer provide valuable information to the media, on many subjects, for fear of reprisals, unwanted publicity, loss of jobs, or other public interference with their families and their private lives. Once again the public's basic right to know is the loser.

Our entire governmental system, however, is made up of checks and balances. In weighing newsmen's privilege legislation, we must not lose sight of another constitutional amendment—the Sixth Amendment right to a fair trial. The historic right of the public to "everyman's testimony" must be evaluated, and is often cited as a principle reason for a qualified rather than an absolute newsman's privilege.

Once again, in my bill, I have recommended that consideration of any less than absolute privilege be confined to the actual trial of a specific case, after investigative work has been done. This insures that the news media can never be used for governmental "fishing expeditions."

In addition, I feel standards must be set by Congress to limit any required testimony of newsmen to only a narrow set of circumstances. It can be dangerous for Congress to be too specific in outlining conditions that must be applied by the courts, and thus the language of a qualified privilege may have to be general. But the statutory language and legislative history combined should show congressional intent to seek a nearly absolute newsmen's privilege, with exceptions being permissible only under relatively unique circumstances.

In my bill, a key condition before any testimony could be required is "a compelling and overriding national interest in the information." This type of language, coupled with requirements of (1) clearly evidenced relevance of the information sought, and (2) no alternative means to obtain the information, can provide a buffer to protect national interests. But the courts will be on notice that only rare and unusual circumstances would justify the use of these conditions. In addition, a heavy burden of proof must rest totally on the governmental body seeking news information in the rare case when a court should even consider such a "clear and compelling" national interest to be at stake.

My bill was limited to federal bodies. However, I want to indicate my support for enactment of newsmen's privilege legislation at the national and state levels. If it is Constitutionally permissible for Congress to impose such requirements on the States, I will support inclusion of States in our legislation. However, if we cannot legislate for the States, I hope our legislation will be strong enough to be a model for the States to follow suit.

In conclusion, I must confess I was surprised last year to discover that the freedom of the press of the First Amendment did *not* provide protection from disclosure of news sources and information. I had assumed these freedoms were protected.

Two court opinions indicate the challenge ahead of us. Associate Justice White in the *Branzburg* case denying the basic constitutional news protection privilege last summer said we had the power to provide a statutory privilege. In a subsequent case, a 2nd Circuit Court of Appeals judge wrote, "It suffices to state that federal law on the question of compelled disclosure by journalists of their confidential sources is at best ambiguous." It is our duty to clear up that ambiguity—on the side of the First Amendment, and a vigorous, strong freedom of the press.

Senator ERVIN. The next scheduled witness is Senator Eagleton. I understand he is on the way to the committee room, so I will wait just a few minutes to call him.

Senator, I want to thank you for coming before the subcommittee and giving us the benefit of your thoughts on this very important issue.

STATEMENT OF HON. THOMAS F. EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator **Eagleton**. Thank you, Mr. Chairman, and I appreciate your indulgence in my brief tardiness.

Mr. Chairman, I welcome this opportunity to testify before the Subcommittee on Constitutional Rights on the free press. I want to express my appreciation to you and the other members of the subcommittee for your leadership in this effort to determine whether we need a "newsman's privilege" law and, if so, what kind of privilege would best serve the public interest.

My own view is that we do need such a law, although I believe that the popular "newsman's privilege" label is inappropriate.

In preparing the News Source Protection Act (S. 870), my bill, my primary concern has not been the protection of newsmen, but rather the protection of a free flow of information as guaranteed by the first amendment. To the extent that information is available to the public only from sources who insist upon anonymity and protection of background information given in confidence, protection of a free flow of information necessarily means protection of these news sources.

I frankly do not believe that potential news sources will be reassured by a privilege which is riddled with loopholes and exceptions, which applies in one forum or jurisdiction but not another, or which is so complicated as to be incomprehensible.

I therefore support a simply drawn, absolute privilege protecting only confidential sources and which would apply in both State and Federal forums.

The privilege set out in section 2 of my bill differs somewhat both from the absolute privilege defined in Senator Cranston's bill (S. 158) and from the qualified privileges included in other bills pending before the subcommittee.

The News Source Protection Act sets forth an absolute privilege against compulsory testimony or production of documents by a newsman where the information sought relates to the identity of confidential sources or to any information given to the newsman in confidence. The key is confidentiality. The privilege does not extend to all information which comes to a person in his capacity as a newsman, as it does under the Cranston bill, but rather to confidential source identity and confidential information only.

Nor does the privilege in my bill protect against compulsory disclosure of information which comes to a newsman in his private capacity. If the information sought "relates exclusively to matters unconnected with" the newsman's gathering, compiling, or disseminating of news, he may be compelled to testify or to produce documents on the same basis as any other private citizen.

A second important feature of the News Source Protection Act is the procedural safeguards set forth in sections 4 and 5. These safeguards are intended to put an end to the use of subpenas as tools of harassment against newsmen—a phenomenon not uncommon in recent years—by providing a mechanism for determining before the issuance of a subpena whether the information being sought is privileged.

The bill requires a full hearing on the record, with the newsman given an opportunity to be heard and a right of appeal, before the subpena may be issued. The burden is on the party seeking the subpena to show that the information is unprivileged. If the information is found to be privileged, the subpena may not be issued.

The decision as to whether or not a subpena may be issued against a newsman may be made only by a judge or other specified person of high authority. The bill thereby precludes the issuance of subpenas on the whim of individual prosecutors, bureaucratic underlings, or—with all due respect to the talented staff in this room—by legislative committee staff.

A third distinction between my bill and others before the subcommittee is the distinction drawn between circumstances under which a newsman may be compelled to testify in an ongoing civil or criminal trial and the circumstances under which he may be compelled to testify before a grand jury, legislative committee, or executive agency.

Proceedings before trial courts differ in at least two basic ways from proceedings before other governmental forums: First, testimony at a trial is strictly circumscribed by rules of evidence which provide that extraneous, irrelevant, immaterial information is not acceptable to the court. Counsel for both sides are compelled to stick to the point, with little or no opportunity to "fish" for whatever the newsman may know. By contrast, proceedings, before grand juries, investigative and legislative committees and the like are not subject to strict evidentiary controls and often do become "fishing expeditions."

Second, trial courts depend upon cumulative evidence, with each bit of evidence tied to the next bit until a cogent case has been made. It is not unusual for a single person—quite possibly a newsman—to have the precise bit of evidence necessary to make the case for the prosecution or the defense. In the other forums, however, cumulative evidence is not essential to their functioning.

In none of these forums may a newsman be compelled to testify as to privileged—that is, confidential—information; that privilege as to confidential information is absolute. However, a newsman may be compelled to testify as to nonconfidential information gathered in the course of his work at an actual criminal or civil trial where the information is material to the inquiry and where equivalent information is not available from another source. I concede that my so-called "equivalent information" test is debatable.

Thus, where a newsman is on the beat and happens to see a criminal act being committed, he may be compelled to testify or produce photographs at the trial of the accused, if he is the only source of that information. However, if he witnessed the crime in the context of a confidential relationship with his source—as did both reporters Caldwell and Branzburg—he could not be compelled to testify. By way of contrast, the Cranston bill precludes compelled testimony as to all information gathered in the course of the newsman's work; under that bill, he could not be compelled to testify as an eyewitness in either case.

Where the information is sought by grand juries, congressional committees, or other forums with a high potential for "fishing expeditions," the bill imposes a stricter rule. These forums may compel testimony from a newsman only when it does not relate to his work. The mere appearance of a newsman behind the closed door of a grand jury session is enough to chill sources. And it is important to keep opportunities for "fishing" in the newsmen's minds and files to an absolute minimum.

Thus, Mr. Chairman, my bill has a double cutting edge. The first edge is the distinction between the kinds of information gathered by a newsman in the course of his work—confidential and nonconfidential—and between information gathered as a newsman and that coming to the newsman in his private capacity. The greatest protection is afforded confidential information; no protection is afforded information which is not related to the newsman's work.

With respect to the middle ground of information, that gathered in the course of a newsman's work but not in a confidential setting, a second cutting edge applies. Here, a distinction is drawn among the forums which may try to get this information. My bill makes it available to the forum which is the most likely to have a real need for it and is least likely to harass the press by fishing for extraneous materials—namely, the courts.

While this particular formulation may not be precisely the one the subcommittee prefers, I do think it contains procedural safeguards which should be considered for purposes of discussion and debate.

If you will permit me, Mr. Chairman, I would like to touch briefly on a few additional points.

First, I know that you are not inclined to preempt the States in the area of source protection. However, I want to add my voice to those who have already expressed the view that under both the commerce clause and the 14th amendment, Congress does have the authority to pass such a law. News flow knows no State boundaries; stories now travel by almost instant transmission from the smallest town to cities across the country. Many newspapers and broadcast outlets have interstate circulation. I have no doubt that the commerce clause would give us the necessary authority to legislate for the States in this area.

Next with respect to the 14th amendment, I believe it would be within the authority of Congress to find that the privilege is an essential part of newsgathering activity, a finding which the Supreme Court did not make in its case last year. Newsgathering is protected under the first amendment, and if the newsman's privilege is an essential element of that function, it, too, could come under the umbrella of the first amendment—and be applied to the States through the 14th amendment and its enacting clause. Thus, it is my view that Congress can make a finding of fact that the protection of confidential news sources is necessary to enhance the first amendment and to make such finding binding on the States through the 14th amendment.

Finally, I now direct attention to the question of libel as it would relate to the possible required disclosure of confidential sources. Sec. 6(a) of my bill deals with this question, but I must say it deals with it inadequately and that section must be redrafted.

It is my belief that a libel or slander action should not be available as a vehicle to pry open confidential sources. On the introduction of my bill, I was asked by a reporter:

> Well, if your bill immunizes confidential sources in a libel action, won't this run the risk that a journalist might greatly harm an individual by writing a bogus article based on spurious confidential sources?

The blunt answer, Mr. Chairman, is that, yes, an innocent person may be harmed. Human reporters writing about human beings will commit human errors. This simply is a price which has to be paid in order to see that the first amendment guarantee of a free press is not compromised.

Mr. Chairman, I know of the deep reverence you have for the Constitution. I too share that reverence.

I have a particular reverence for the 1st and 14th amendments. I feel that even if other portions of the Constitution were altered, if we protected the sanctity of the 1st and 14th amendments the basic structure of American liberty would be preserved. Therefore, some individuals may well have to pay the price of being the target of erroneous journalism. I repeat. this is a price which simply has to be paid in order not to jeopardize the free flow of news.

On the question of libel, I cite for the record the cases of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); and *Cervantes* v. *Times Inc.*, 464 F. 2d 987 (1972), cert. den. U.S. (1973).

The *Cervantes* case is interesting in that the plaintiff in a libel action sought to discover the names of *Life's* confidential sources and the court of appeals ruled that *Life* was not required to divulge them.

Mr. Chairman, I refer you at this point to the memorandum in libel law submitted yesterday by Senator Mondale. I think it is an excellent memo.

Again, Mr. Chairman, I commend you and the members of the subcommittee for your efforts in this area. I am hopeful that we can pass a reasonable, effective privilege bill in this session.

Senator ERVIN. You have made a very significant contribution to our study. You have some ideas which are quite original and I don't believe are found in any other bill.

I think we agree that this problem has been made very acute by the practice of using grand jury laws. not as a judicial branch of the Government but as an information gathering branch of the Government. That is particularly true in respect to Federal courts.

Senator EAGLETON. Yes, indeed.

Senator ERVIN. We still have in my State a grand jury system whereby no one is allowed in the rooms but the witnesses.

Senator EAGLETON. How about the prosecutor?

Senator ERVIN. Prosecutor is not allowed either.

Senator EAGLETON. As a prosecutor I was allowed in the grand jury room.

Senator ERVIN. That is likely to happen where the prosecutor is there.

Senator EAGLETON. I was required to step out when they voted an indictment. but I only stayed 30 seconds away from the door because they only voted the ones I wanted and always returned no true bill when I said that is what I wanted them to do.

Senator ERVIN. The grand jury is a judicial body which stands between the citizen and the Government. and for that reason I have never favored the prosecutor being there while the grand jury is taking the testimony.

Senator EAGLETON. But I think North Carolina is probably in the minority.

I think in a number of states the prosecutor stays in the full deliberations right up to the voting on the document.

Senator ERVIN. Yes. In fact, I think the grand jury system has become perverted into an agency to gather information for the prosecution.

Senator EAGLETON. Absolutely, and that is why I differentiate in this bill in terms of nonconfidential information gathered by a newsman as a reporter between compelling him to testify as a court of record vis-a-vis compelling him to testify before a grand jury or legislative committee.

Senator ERVIN. I remember when Justice Powell's confirmation was passed on by the Judiciary Committee, he was asked whether he approved the practice which has grown up in the Federal courts in recent years of sending even suspects before the grand jury in the hope that they would fail to invoke the fifth amendment and incriminate themselves. Justice Powell said that he didn't know that that practice existed, that he had done civil law and had very little experience in the criminal law. But he said he thought that practice was "right unfriendly."

Senator EAGLETON. Right unfriendly, to say the least.

Senator ERVIN. As you point out, there is danger in a congressional committee, and there is danger in a grand jury of embarking upon a "fishing expedition." This is a situation which, as you point out so well, does not exist in the trial courts where you have a judge to rule according to established rules of evidence and fishing is not allowed. Everything has to be relevant to the issues.

Senator EAGLETON. Correct.

Senator ERVIN. And I think that is a very valuable distinction between the two types of tribunals.

Your bill is based upon the theory that the privilege should only exist in respect to trial courts, at least, where the information received by the newsman is received in the exercise of his occupation and is received in confidence.

Senator EAGLETON. If the information received is confidential, it is absolutely protected under my bill, but then there is the gray area in the middle and I use this hypothetical:

Assume a peace march at the Washington Monument. Assume a reporter goes out there to cover it and he is there as a newsman. He sees an assault take place, an attack of a police officer. He could be compelled to testify as to what he saw in a court of law, but could not be compelled to testify as to what he observed either before a grand jury investigative committee or the Federal Trade Commission, if they were to be involved by some extraneous concept. But if a reporter walking down the street on his lunch hour sees a woman stabbed on the corner, he is not on an assignment, he has to testify as to that the same as any other citizen.

There are really three areas of testimony: confidential sources and information either observed or heard which are absolutely protected, eyewitness things on newsman's beat, to which he may have to testify in court; and information coming to him as John Q. Citizen to which he has to testify in front of a grand jury, court, what have you. He is not immunized by the fact that he carriers a reporter's badge.

Senator ERVIN. I want to commend you on the approach you take to the question.

Senator EAGLETON. The one area in which you and I strongly disagree is whether this bill can be made applicable to States. I think it is indispensable this bill cover both Federal and State forums.

If we were to have a Federal bill only and await the 50 States to devise different kinds of privilege laws, I don't think that the Federal alone will accomplish much.

I don't think the newsmen in talking to a source says, "I have got to see what State you are in—Montana: I can protect your confidence under the Ervin Federal law, but Montana doesn't have a state law, so I can't protect you completely."

Senator ERVIN. Well, I am not irretrievably wedded to the idea that the states be excluded. I do recognize that news knows no boundary lines. We have the greatest news gathering and disseminating agencies in the world, and they broadcast with no boundary lines. The same thing applies to our newspapers.

You have a novel approach in that you provide for a determination of whether the subpena should be issued, shall be made before the subpena issues. It is an obvious fact that where a newsman who has had confidential sources of information goes before the grand jury, those sources don't know what he says in the grand jury room and consequently they are not going to tell him or any other newsman anything in the future.

Senator EAGLETON. Exactly.

Senator GURNEY. Well, I want to echo the chairman's comments on the bill. It is quite unusual and a lot different from the others presented, and I think a much more realistic approach to this whole problem.

Could you shed any more light on how you would determine confidentiality in the hearing before the subpena is to be issued?

Senator EAGLETON. Well, that is a difficult question, but that has to be coped with.

In this hearing before the subpena is issued, the newsman who wants to challenge the subpena would get on the stand and would be asked, "What is your source?"

He would say it is a confidential source.

Now you are pretty much stuck with the unqualified word of the newsman himself, because if you probe too much further and say: "Is the source 40 years of age or older, male or female, white or black, et cetera," if you try to probe too much in ferreting out what his source is, you will expose the source.

Let us take my Washington Monument situation. Suppose a newsman gets on the stand and says: "I don't want to testify. I was at the Washington Monument and I was there on a confidential tip."

The prosecutor, if he is the subpenaing force, will say; "Wait a minute, I am not requiring information about any confidential tip. I am inquiring of you as to what you saw as a witness, not based on any confidential tip you received to go out there, but what you saw. Did you see the attack of Officer Jones?"

Then I think the newsman, under my bill, would be compelled to testify in the court of law as an eyewitness because what he saw was not in confidential circumstances.

Now, take Branzburg and Caldwell. One was a confidant of the Black Panthers and the other witnessed a hashish processing operation. Each of them was invited in, one by a Panther group to see what was going on, and the other by a hashish operator to see what was going on there.

I think that is privileged. That is confidential information as he was taken there under a confidential cloak, and he wrote a story about how he saw hashish being made and so forth.

I think that is protected.

Senator **Gurney**. Let us go back to the *Caldwell* case. Mr. Caldwell testified before us yesterday, and he told us he was engaged in a series of investigative reporting events to accumulate all the information he could on the Black Panthers.

Let us assume he is on that trail. He writes a story. Maybe some Black Panther doesn't think this story is very accurate. So this Black Panther says to a newsman he knows, "It didn't happen that way; it happened this way."

This other newsman, not really engaged in investigating the Black Panthers at all, is a friend of this Black Panther. Suppose that were a relevant piece of information involving a criminal action. Under your bill could you subpena this second newsman to get that information?

Senator **Eagleton**. Now wait a minute. Has the source of the second newsman come forward and volunteered his information?

Senator **Gurney**. That's right.

Senator **Eagleton**. Then the veil of confidentiality, to abuse an old law school term, has been pierced, and then so far as the second reporter is concerned, there is nothing he can plead insofar as confidentiality.

As to the first reporter, he still is not affected as to the confidentiality of his source as to what another reporter or another person does.

Senator **Gurney**. I would agree with that, too.

Let me ask you a question—you mentioned libel, very briefly, Senator Eagleton, and I, of course, understand that if you are going to use fishing expeditions and penetrate confidentiality to substantiate a libel case, then confidentiality goes by the board. I understand that, and that is not what the question is directed to.

I am just interested in your general feeling about *New York Times* v. *Sullivan*, which seems to me has completely destroyed any libel redress that an aggrieved party might have because, of course, as you know, you have to prove malice, and you cannot prove malice without getting inside the man's mind.

Senator **Eagleton**. If I had been sitting in the Supreme Court in 1964, I would have dissented. Frankly, since I think they base that decision on the first amendment guarantee, I don't think there is anything that can be done legislatively. I don't think you can redefine "malice" in legislation any more than we can legislatively charge what they held on abortion 3 weeks ago.

That opinion can be dealt with by constitutional amendment, but not legislative——

Senator **Gurney**. I would agree with you; if I had been on the Court, I would have dissented too. I am not sure what really can be done about it legislatively.

Let me pose this question: If you think it is advisable for Congress to pass a shield law, then if it were possible to devise a constitutional legislative approach to overturning *New York Times* v. *Sullivan*, do you think that would be advisable for us to do?

Senator **Eagleton**. Senator, I just question your hypothesis. You say if it were possible to devise a constitutionally viable legislative approach. I don't think you can.

I am being flooded with—I have almost 5,000 letters on abortion. What I am writing back to them is the only remedy available is a constitutional amendment and constitutional amendments overturning Supreme Court decisions just don't come about.

Senator GURNEY. You may be right.

Thank you.

Senator TUNNEY. Mr. Chairman, I would like to commend Senator Eagleton on an outstanding statement and a very interesting approach to the problems involved in this complex area.

I have some questions with respect to your approach, Senator Eagleton.

Some witnesses have said that if there are any qualifications at all to the absolute privilege that this is going to mean that the privilege itself would be relatively meaningless arguing there would be an encroachment upon that exemption of qualification over a period of years to the point that there just will not be any privilege at all after a period of time.

We have heard testimony to that effect, maybe not going quite as far as I suggested, but some persons have argued that it is an all-or-nothing proposition, that they want either an absolute privilege or none.

Now, with respect to your statement, you indicated that in the first instance the test is whether or not the information gathered by the newsmen is confidential or nonconfidential.

If it is confidential, there is no way that the newsman can be questioned about it, and the second test is whether or not be gathered the information in his working capacity or in a private capacity.

As I understand it, that if a newsman gathers information in a private capacity, he could be required to testify before the grand jury?

Senator EAGLETON. Private citizen capacity—where he is not on assignment—he is a eyewitness to an intersection collision and the guy is indicated for negligent manslaughter, and he just happened to see this guy go careening through this red light and hit this woman with seven kids.

He would have to testify.

Senator TUNNEY. As I understand it, those questions, will be resolved in the first instance by a judge when a prosecutor tries to get a subpena. The prosecutor cannot issue a subpena. The grand jury cannot issue a subpena. It is only the judge who can issue a subpena.

Senator EAGLETON. Yes, that's right.

Senator TUNNEY. Because somebody is going to have to make the decision as to whether the requested material is confidential or nonconfidential or private or not private?

Senator EAGLETON. Newsmen might not challenge the subpena. I think most newsmen, in fact I can't think of one—I know some bizarre newsmen, but even the most bizarre, if he were a witness on the corner at this intersection, and he saw this lovely lady and seven children annihilated by a drunk driver going through a red light, and he was asked to testify in court, there is not a newsman I know of who wouldn't willingly testify as to what he saw.

Senator TUNNEY. I understand that most newsmen would want to testify under those circumstances.

But let us say we got one that didn't like human beings, and he was recalcitrant, and he decided he wasn't going to testify.

Senator EAGLETON. Then he can challenge the issue of the subpena.

Senator TUNNEY. I want to understand the procedure. As I understand it, the prosecutor can't issue a subpena. They have to go to a judge first?

Senator EAGLETON. Yes, that's right.

Senator TUNNEY. And as I understand it, the purpose of that is to make it very difficult for subpenas to be issued?

Senator EAGLETON. To try to dampen frivolous subpenas and to——

Senator TUNNEY. For instance, it is my understanding that maybe as many as a hundred or two hundred subpenas were issued in the past couple of years by Federal prosecutors against newsmen, and one of the things that your bill would do would be to create obstacles that a U.S. attorney or grand jury or a state prosecutor would have to overcome before they could be issued?

Senator EAGLETON. Right.

Senator TUNNEY. And then once the judge made a decision and he let us say, decided that this was information gathered by a reporter in his private capacity, then the reporter would be required to go before a grand jury?

Senator EAGLETON. He could appeal that decision, by the way.

Senator TUNNEY. He could appeal that decision?

Senator EAGLETON. He could appeal that determination, yes.

Senator TUNNEY. What would he be required to tell the judge before the judge made his decision?

Senator EAGLETON. The prosecutor would, to take a hypothetical—the prosecutor would put on evidence, I guess, by the arresting police officer investigating the case, that reporter Jones was at this intersection and reporter Jones saw this car come through at 80 miles an hour and demolished the other car. Reporter Jones gets on the stand and says, "Judge, I don't like courts very much. I am a reporter, and I don't like testifying very much."

"Were you there as a newsman?"

"No, I was on my lunch hour."

"Did you have any confidential information?"

"No, I was just walking down the street on my lunch hour."

Then I think the court makes it very obvious he is there in his private capacity, and he is compelled to testify.

Senator TUNNEY. Let us say it is a closer case and let us say that the reporter says, "I was where I was as a result of a confidential communication, and the only reason I was here was because of the confidential communication."

And the judge said, "Well, I would like you to describe the facts."

Senator EAGLETON. You mean he got a confidential tip to be at the intersection?

Senator TUNNEY. No, a closer case.

Senator EAGLETON. *Branzburg?*

Senator TUNNEY. Yes, *Branzburg*.

Senator EAGLETON. *Branzburg* is protected.

Senator TUNNEY. And the judge would have to take the newsman's word on that?

Senator EAGLETON. Correct, there is no way you can impeach his credibility, and as I said, in answer to Senator Gurney, if you the prosecutor to ferret out about who the confidential source is, you are destroying the kind of protection we are trying to create.

Senator Tunney. The interesting thing about your legislation insofar as I am concerned is that it makes it a great deal more difficult to get a subpena. I think that that would tend to dampen the enthusiasm of some prosecutors to try to get a newsman before the court or before a grand jury in order perhaps to harass them.

Senator Eagleton. Right.

Senator Tunney. It is a very interesting approach and I commend you on it.

Senator Eagleton. Thank you, Senator.

Senator Ervin. I want to speak a good word for the *Sullivan* case. When the case was first handed down it was so interesting that I have studied it and was taught about the law, too.

I was shocked. But I think it is a wise decision. At the heart of it, I think, is the old saying of Harry Truman of your State, who said "If you can't stand the heat, get out of the kitchen."

The first amendment contemplates that there should be the fullest and freest discussion of the qualifications of candidates for public office, and the *Sullivan* case, as I construe it, has this effect. I agree with you that you can't change that decision by legislation because the Court rests squarely on its interpretation of the first amendment.

Senator Eagleton. Correct.

Senator Ervin. That decision said in effect that in order for an occupant of public office or candidate for public office to recover damage for libel, he would have to show that not only the article was false, but also that its publication was prompted by actual malice which the court in effect says is either publishing with knowledge of its falsity or with reckless disregard of whether it is true or false.

Senator Eagleton. A very difficult test.

Senator Ervin. It is very difficult under that decision for any man who is a candidate for public office or the occupant of a public office. It has also been extended to a public figure to recover damage for libel, and I don't know but it is well that it is that way.

But any other rule, it seems to me, would chill the willingness of the press or of individuals as far as oral conversations are concerned to discuss all the reasons why you should support or not support a particular candidate.

I think that the good, the ultimate good it does to the public is outweighing the unfortunate results it has on the individuals concerned.

Senator Eagleton. You make a very compelling argument. I can't disagree strongly with what you are saying. I have a slight bias against the case, but there is a good deal in what you say.

Senator Ervin. I agree with you on the abortion case. I got as many letters.

I just write back and I say I think the Supreme Court stuck its nose in an area that is none of its business.

Senator Eagleton. Exactly. But this is constitutionally sanctified.

Senator Gurney. One final small detail here.

Of course, one of the things that all of us are interested in is speedy criminal trials. In fact, I was cosponsor of the bill of our Chairman here which will provide for speedy trials. That bill provides for trial within 60 days, as I recall.

Senator Eagleton. What's the trial on in 60 days; the trial on the subpena?

Senator Gurney. Well, this is a bill which has general application in order to speed up the process of criminal courts and unburden our dockets. This is another bill.

My question is, if we are going to have preliminary hearings on subpenas and then appeals, is there anything in your bill that would speed up this process?

Senator Eagleton. I don't think there is, but I would certainly stand for an expedited appeal within a limited time frame, et cetera, and expedite it up the docket.

I intend the proceeding to be as Senator Tunney has pointed out, but I don't think it would be dilatory.

Senator Gurney. That is correct. I think we do have to provide for speedy trial of the person to whom the newsman's supposed information relates.

Thank you.

Senator Ervin. Just one observation.

It is well established that there are ways to prove whether a thing is confidential.

As a matter of fact, the Government prosecutors used to object to any effort on the part of defendant's counsel to ferret out the confidential sources of information on which they started on the trial that led to the prosecution. So your bill just says in effect that what is sauce for the legal goose should be sauce for the legal gander that the confidential sources of the newsman will be protected just like the confidential sources of information received by the law enforcement officers.

Senator Eagleton. Quite common, as the Chairman notes, in narcotics cases before a search warrant is issued on a motion to quash, the state would then put on evidence of a police officer that, yes, he sought a warrant to go to a certain house at a certain time to seek certain goods because he got it on reliable information of a reliable informant, is the language we used to get the police officers to use, since we helped coach them.

There is confidentiality in criminal cases per se, and narcotics cases, particularly.

Senator Ervin. If the sources were not confidential, the prosecution would not be trying to find out what they were.

Senator Eagleton. Very true.

Senator Ervin. Thank you very much.

You have given a most illuminating exposition of the question.

Mr. Baskir. Mr. Chairman, our next two witnesses are Mr. Brit Hume, writer, and Mr. Joel M. Gora, of the American Civil Liberties Union.

STATEMENT OF JOEL M. GORA, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY BRIT HUME, WRITER

Mr. Gora. Senator Ervin, my name is Joel Gora. I am staff counsel of the American Civil Liberties Union, with me today is Brit Hume, a working journalist, who, on the basis of his experience, will present information to the committee about the processes employed by journalists.

We have both prepared statements that we have submitted, and we hope those statements will be made part of the record of these proceedings.

Each of us will make a few brief comments and then we will be glad and delighted to answer questions.

Senator Ervin. The written statements which you submitted to the subcommittee will be printed in full in the body of the Record immediately after your oral testimony.

Mr. Gora. Thank you, Senator.

Three years ago, when these issues first received public attention, 3 years ago this month, perhaps even this week, the A.C.L.U. became involved in this question. At that time we urged two primary propositions, first, that the primary function of the press is to gather information and inform the citizenry, and second, that the members of the press can't discharge that function unless they are able in some significant ways to protect their sources and information.

Happily, the first premise has become axiomatic, and no matter what position you take on this issue, everyone starts out with the understanding that the first amendment is there not for the benefit of journalists, not to protect them, but so that the public will be fully informed.

The second proposition, that in order to do that, journalists require protection for sources and information, is what these hearings are all about.

The Supreme Court majority, a narrow majority, concluded that such protection was not required.

In my written statement I have suggested reasons why we think that conclusion was wrong. But most importantly I think the Court was simply insensitive to the news gathering process.

These hearings are remedying that defect by hearing testimony from working journalists and hearing their descriptions of how the process works.

Let me, if I might, just respond to what I understand to be some of the questions that are concerning the committee.

First, the question of whether there is a need for legislation. I think that is fairly clear. Since the Supreme Court's decision in June, there have been a number of reporters who face jail, and a number of reporters who have been thrown in jail.

Many of those episodes have been documented in a magazine article by Mr. Hume in the *New York Times Magazine* of December 17, 1972, and with the Senators' permission, I would like this article to be made part of our presentation, as well.

Senator Ervin. If you can furnish the subcommittee with a copy of the article, we will put the article in the record.

[The article referred to is printed in the appendix.]

Mr. Gora. I think the most troublesome thing about these subpenas is the kinds of stories that the journalists who are facing incarceration and punishment have been covering. There have been stories about corruption, about conditions in various institutions, penal, hospitals, juvenile, hospitals, and so forth. These reports have been developing information that makes it possible for the public to be better informed.

The kind of journalists who require statutory protection or judicial protections are the best journalists we have, the ones who illuminate the issues of our day.

I think there is no doubt that legislation is needed, Senators.

Moreover, such protection should reach beyond Federal proceedings. I think there is congressional power to do that. Senator Eagleton has referred to the premises of that power.

The other issue is whether it is desirable to exercise that power. I think that it probably is. Many of the journalists who have been subpenaed were in states where there was supposedly State protective legislation. A strong Federal statute will remedy much of that problem.

If there is only Federal protection in Federal processing, then in those states that don't have comparable State provisions you will have a version of the old silver platter doctrine. If the Federal prosecutor can't ask the reported questions, he calls the reporters by subpena.

It used to come up in terms of the admission of evidence into the Federal or state proceedings.

I think it is a real problem which argues for protection in all forms of proceeding, Federal and State.

Finally, if the bill does cover state proceedings it should make clear that where there is a state law that goes further, that gives more protection, then that law is not preempted by the Federal statute.

The other issue that the committee is wondering about is who should be covered.

Victor Navasky, an investigating reporter, has suggested that authors of nonfiction books should be covered since they are simply slow journalists. The process is the same, the investigative process, whether culminating in a daily newspaper column, article in a magazine or a nonfiction book, and it is that process which must be protected. Similarly, we would hope that the bills that define who a newsman is don't restrict it so narrowly that only the traditional establishment press is protected.

There are two other points that I would like to make. In terms of the mechanisms for invoking this protection, I agree with Senator Tunney's observations that simply making it burdensome for whoever wants to subpena a reporter to do so will accomplish much of what we are here to urge you to do. Burdensome in terms of the showing that must be made and burdensome in terms of requiring a court order before any kind of disclosure can be required. I think that alone would perhaps eliminate the majority of subpenas now issued. It is a very casual thing to issue a subpena if it could not be done *ex parte*, they would not be so frivolously issued.

Finally, the most difficult question and certainly the one that has provoked the most controversy, is what kind of protection should be afforded. I don't know whether the matter can be stated as simply as whether the privilege can be absolute or qualified. In a sense even an absolute bill which requires that the information to be protected must be obtained in the course of functioning as a journalist is really a qualified bill. But everyone accepts that. Those absolute bills have a qualification, but the qualification isn't germane to the issue. As I understand it, when we are talking about qualifying a refusal to provide information we are talking about a showing or finding that a particular interest is more important than the system of newsgathering and the free flow of information to the public. I can think of very few instances which are that important. I know that Senator Ervin is concerned with reporters who are aware of information about criminal activity, but some of the best investigative reporting we have comes as a result of reporters being given access to that information. I think the tradeoff is worth it. I think that having that information disseminated to the public so that the political processes can be informed in most instances is more important than incarcerating a particular criminal.

Let me give you an example. It is my understanding that *Newsday*, out on Long Island, is running a series of articles describing and tracing the importation of heroin from poppyfields in Turkey all the way to addicts in New York City and describing events all the way along the line. Now a prosecutor would think that that reporter can be called in and could provide information which could break this entire smuggling ring. But I think it is far more important that the 10 million people in the New York metropolitan area and everyone else be able to have an awareness of how the criminal activity works, whether there is complicity by foreign governments and so forth. I think the tradeoff, sacrificing the right to get the reporter's information in order to increase the flow of information is worth it.

Let me mention one possible exception. If this subcommittee is going to recommend a bill that lists exceptions, whether they be in terms of categories of crimes or in terms of the level of compelling interests, I think certainly there must be an exception for the criminal defendant in a felony case, when the reporter has highly exculpatory information. I think that exception is necessary, because in that situation you have a clash between two sets of constitutional values, those protected by the first amendment and the defendant asserting his specific textual right in the sixth amendment for compulsory process to obtain witnesses. I think in that situation the defendant's rights might prevail, but I would circumscribe that situation very carefully. I don't think it is quite the same when the need for information is merely premised on the public's right to every man's evidence. But when the defendant asks for it, depending on the sixth amendment specifically, then I think in that clash of values perhaps the first amendment interests can be overwhelmed.

Mr. HUME. Mr. Chairman, I had written my statement with the intent of reading it into the record, and unless it will slow things up too much I would like to go ahead and do that. It is the only statement that I have.

I am grateful for the opportunity to be heard here today. The immediate purpose of the legislation before this subcommittee, as I see it, is to mend the damage done to freedom of the press by the refusal of the Supreme Court to accept the idea that the first amendment should protect the press' confidential sources of information from identification in grand jury testimony by reporters. There are already numerous examples of the chilling effect which this decision has had both on the press and on its sources of information. I cited some in the article I wrote for the *New York Times Magazine* on this subject. Other reporters have turned up other examples. The fact that these examples have surfaced at all is an indication of how pervasive is the impact of the court's ruling. For journalists do not normally find out about the stories they don't get. For every visible case of a story that got away because of a reluctant source or a cautious reporter or editor, there must be many others of which we are not aware. As great a problem as grand jury testimony has been for the press, I would hope this subcommittee would be willing to consider the issue of newsmen's privilege in a larger context. As I shall try to demonstrate, grand juries could ultimately prove to be a lesser threat to the confidentiality of reporter's sources compared to the threat posed by another form of compulsory testimony.

Before going further I want to say for the record that I favor an absolute privilege for newsmen to protect their sources. I believe it should apply to the states as well as Federal jurisdictions. I recognize, however, that there is probably only the slimmest likelihood that such absolute legislation could be enacted. And one of the exceptions which seems most likely to be included in a newsmen's shield law is one which would remove the shield in cases where journalists are sued for libel. Yet this is an issue that seems largely to have been passed over in the discussion of shield legislation so far. Because I have had personal experience with this question, I would like to focus my testimony on it. I believe that if reporters are left without protection for their sources in libel suits, such suits could become a far more dangerous device for the harassment intimidation of the press and its sources than grand juries could ever be. The reason is that grand juries can only be convened by certain designated officials while anyone at all can file a libel suit.

The first fact which must be understood in dealing with this question is that there isn't much left of civil libel as we once knew it in this country. In a series of decisions dating from the pivotal *New York Times v. Sullivan* case in 1964, the Supreme Court has drastically narrowed the circumstances under which a newsworthy individual may collect libel damages. The Court has held that unless the plaintiff can show that the libel was published with knowledge of its falsity or in reckless disregard of whether it was or not, the first amendment protects the defendant. At first the Court applied this awesome standard of proof only to persons deemed to be public figures. More recently, however, in the celebrated case of *Rosenbloom v. Metromedia*, it has broadened its application to include "all discussion and communication involving matters of public or general interest, without regard to whether the persons involved are famous or anonymous." The Court has also made clear that its idea of reckless disregard of the truth means, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." (*St. Amant v. Thompson*)

Such a standard of proof, applicable to virtually anyone mentioned in a news story, broadcast or article, would seem to make winning a libel suit against the news media exceedingly difficult. There are many who feel that the Court went too far in these decisions and left the individual defenseless against the worst excesses of the press. That is an understandable viewpoint. But it seems to me that the Court acted wisely and in harmony with the purpose of the first amendment. The idea that seems to underlie these decisions is that, in a democratic society, where freedom of speech and of the press are both cherished and necessary to the proper function of Government, the law must encourage, not discourage the publication of even the most damaging kind of information about public issues. The kind of information that injures reputations and brings libel suits is often the kind most essential to the public's understanding of the workings of Government.

Such information, of course, is the hardest of all to get and those whose pursue it face far greater obstacles than their colleagues in the press who cover fires or attend news conferences. The possibility of error is greater. The Court has held that because the press is often the only possible source of this vital information, it must be protected in its pursuit of it so long as it acts in good faith.

Until the *New York Times* v. *Sullivan* case 9 years ago, the prospect of a libel suit was a powerful deterrent to investigative reporting. Suits were more frequent then and even when the defendants were clearly right, they were often a long and expensive process. Even now, I have found to my dismay, some elements of the media still shy away from hard-hitting reporting not so much out of fear of losing a libel suit but out of fear of being sued. Nevertheless, investigative journalism in recent years has been increasingly available. The major magazines are much more receptive to it than they once were. Some publications, such as the *Washington Monthly*, carry several investigative pieces in nearly every issue. Before its demise last year—a demise that was not brought on by the weight of any libel judgments—Life published a stunning series of reports dealing with political corruption and underworld activity. Book publishers, which formerly shied away from such journalism because of its risks, are now eager to publish investigative work. I think it is beyond question that the American public has had the opportunity to learn many things about Government, business, labor, and other major institutions which it would not have had absent the protection for journalists afforded by the Supreme Court rulings I have mentioned.

This brightening picture has now been seriously clouded by the questions of whether reporters must reveal their sources when sued for libel. I think I can best illustrate this issue by recounting the circumstances of a suit in which I am personally involved. One of my major undertakings in the past several years has been an investigation of the United Mine Workers of America. My book on the union, "Death and the Mines," was published last year. One of the mildest stories I wrote about the union appeared at the end of Jack Anderson's column more than 2 years ago. The item, one paragraph long, raised questions about a burglary at union headquarters. Edward Carey, a union official, sued me, Jack Anderson and the *Washington Post*, which carried the column, for a total of $9 million. The suit was filed the very day the story appeared and he was so eager to take my testimony that he succeeded in getting a court order for me to appear for a deposition 2 days later. The order turned out to be invalid because I had not been served with the papers at the time, but it illustrates what I believe was his haste not to make his case as much as to learn the identity of my sources. Eventually, his lawyer did take my deposition.

I was asked to name the source of the part of the story to which Carey objected. It was a sentence that said that he and the since defeated union President Tony Boyle had been seen carrying documents out of Boyle's office before Carey reported the burglary. My information had come from an inside source. Tony Boyle's administration had compiled a record for corruption and tyranny perhaps unmatched in the history of the American labor movement. Joseph Yablonski, the man who challenged Boyle for the union presidency in 1969, was later found murdered in his bedroom along with his wife and daughter.

The trail of indictments—and convictions—in the murders has steadily climbed the ladder of the Boyle regime. It is difficult to imagine circumstances where by determination to protect my sources would be greater. So I refused to name them. Plaintiff Carey then sought an order to compel me to name them. His argument, ironically, was grounded squarely on *The New York Times* v. *Sullivan* doctrine. How, he argued, could he prove that I had been reckless or willfully inaccurate if he was not permitted to know where I got my information? He had a point, and the trial judge agreed with him and ordered me to identify my sources. That order is now on appeal. If I lose and still refuse to name my source, I could be held in contempt of court or have a default judgment in Carey's favor entered against me, or both. If I name the source, the suit will end because there is no evidence that I acted recklessly or with knowledge the story was false. Indeed, I believed firmly it was true and still do. Carey has made no showing that my identification of my sources will lead to evidence of the kind required to win the suit. All he has done is file the papers, deny the truth of the story and demand to know where I got it. It does not take much imagination to see what might happen if such procedure were upheld. Since the Supreme Court has seemingly left the issue of newsmen's privilege up to Congress, I think it is quite likely the court might uphold the compulsory identification of news sources in libel suits if Congress specifically refused to make its shield law applicable in this area.

Now there is a plausible point on the other side of this issue. If newsmen had absolute protection against identifying their sources, they could effectively vitiate what is left of the libel laws by hiding behind anonymous sources whenever sued. Nevertheless, I think that the benefits of an absolute shield law would, on balance, still greatly outweigh the disadvantages. I recognize, however, that many Members of Congress would not agree with me. I would hope that they, seeing the merit on both sides, might seek a middle course. I think there is such a course. It was charted by the Eighth U.S. Circuit Court of Appeals in a libel suit involving *Life* magazine and Mayor Alfonso Cervantes of St. Louis. Briefly stated, here is what happened. Life published an investigative article in May 1970, charging that the Mayor had maintained what is called "business and personal ties" to the underworld. Mayor Cervantes sued for libel and focused his complaint on four paragraphs in the article which he said were both false and defamatory to him. The reporter who did the story was asked in a deposition to name the source of those four paragraphs. He acknowledged that most of the story, including the disputed portion, had come from sources inside the FBI but he refused to name them. The Mayor made a motion to compel the testimony. *Life* responded with a motion for summary judgment which argued that the mere effort expended in getting the story was sufficient to bring down the curtain of protection afforded by *The Times* v. *Sullivan* and succeeding cases. The trial judge ignored the motion to compel testimony and granted Life its motion for summary judgment. Mayor Cervantes appealed. The Federal Circuit Court of Appeals upheld the trial judge. In so doing, the court set forth a standard which it said plaintiffs in libel suits against the news media must meet before gaining access to confidential news sources.

The court said, and this is crucial, that:

> to compel a newsman to breach a confidential relationship merely because a libel suit had been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate news gathering activity.

It also said that;

> to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.

Therefore, the court held that there must be what it called a "concrete demonstration that the identity of defense news sources will lead to persuasive evidence" of willful or reckless error before a libel plaintiff can gain acess to confidential sources.

Now this seems to me to be eminently sensible and in keeping with the spirit and intent of *The New York Times* v. *Sullivan* and the succeeding decisions. If such a standard were universally established, the filing of frivolous libel suits would not be made attractive—as it is now—by the prospect of learning the identity of reporters' informants. At the same time, however, in extreme cases—the kind of cases envisioned, I think, by *The Times* v. *Sullivan* doctrine—the door is left open to the identity of news sources when needed by a clearly wronged plaintiff to make his case.

If this subcommittee does not see fit to allow newsmen an absolute privilege to protect their sources, I strongly urge that it consider writing into law the same test for libel suits set forth by the Eighth Circuit Court of Appeals in the *Cervantes* case. For if some protection for news sources in libel cases is not forthcoming, the libel suit will again become a powerful instrument in the suppression of a free flow of information to the public.

It occurred to me as I sat here this morning remembering that a year ago at this time I was testifying before all of you Senators as part of the full Judiciary Committee on the ITT affair, to mention how that whole episode came about as it seemed to me. The central focus of the hearings for much of the time was the so-called Dita Beard memorandum which created a great sensation, but I can show you it was not the Dita Beard memorandum which caused hearings on Kleindienst's confirmation. It was the unpublicized meetings with Felix Rohatyn, the director, which led to the settlement of that antitrust case.

At the time that I was following up on the original story that I did for Jack Anderson's column for that memo, I had occasion to talk to a highly regarded ITT official. He was reluctant to discuss the subject with me but he was willing to do so once I assured him, and this was all prior to the *Caldwell* decision, this was about a year ago at this time, that his name would never come out and there was no need for him to worry about the confidentiality of our relationship, and it was he that told me first that these meetings had been held. It was the first knowledge I had had of it. I was able to proceed to contact Mr. Rohatyn with pretty good knowledge of what had happened and he was able to confirm that they had occurred.

At the time that the story broke, Mr. Kleindienst chose and Rohatyn chose to come before the Judiciary Committee and to plead their case there. But let us suppose that they had taken one or another of some of the other options that might have been open to some of the people in that position. Mr. Kleindienst could have convened a grand jury to investigate the $400,000 alleged contribution to the Republican Convention. I could have investigated that. Nobody knew whether it was from ITT official or Government official or whom that I got my first tip. It would have certainly opened the door to the identification of that source, the punishment of that source with ITT, if still with ITT, or by the Government had the person still been involved with the Government.

Another option would have been to file a libel suit against me and to seek the identity of my source in that way and thereby seek to close off the lead.

So I think that is the case that all of you are quite familiar with which illustrates just exactly the kinds of things that can happen when the door is wide open to reporter sources. I know you perhaps, Senator Gurney, might feel that the ITT hearings were long and drawn out and perhaps unnecessary, but I have no doubt that you feel it was probably good and the facts came out and were thoroughly explored and the public learned it and I feel the kind of chilling effect from the result of having a door wide open to newsmen sources could have prevented that story as it has in others.

Senator ERVIN. You have given us a most illuminating statement from the benefit of your personal experiences in this field.

I would take it that you agree fully with what Mr. Kilpatrick said yesterday—that corruption exists not only in government, but in business, in labor or any kind of big organization.

Mr. HUME. It is a major institution.

Senator ERVIN. That the only practical way by which the public can get information of corruption either in government, or in business, or in labor, or any other activity which bears so much on the interests of the public is through investigative reporters and having inside informants within those organizations.

Mr. HUME. Senator, inside informants are not always the source of all the information, but so often they are the ones that get you started on a story. They give you the first look, first glimpse of what may be there and without them really an investigative reporter is at a loss as to where to look. There are so many things that ought to be uncovered, but you have to know where to start. This is where inside sources are terribly important, and I think indispensable.

Senator ERVIN. It is obvious that those in government who are engaging in corrupt practices or those in business and labor who are engaged in corrupt practices do not wish to be exposed. And often—it is only those on the inside that come to realize what coruption there is.

Mr. HUME. That is certainly correct. The important thing about inside sources is that it must be recognized that they are the only possible sources.

Senator ERVIN. Yes, and even the Government itself and the law enforcement organizations recognize this fact in that they often have some undercover agents infiltrate organizations to find out what is going on within them. So the Government recognizes the value of inside informants.

You have made a very helpful contribution. I think your testimony shows that this committee ought to give serious consideration to the questions which arise in this area with respect to the issue of libel.

Senator **Tunney**. Mr. Chairman, I was interested in the testimony of both witnesses that have testified, particularly the personal experiences of Mr. Hume.

Mr. Hume, in your experience has there been more control over newsmen by government, say, in the last 20 years?

Mr. **Hume**. Well, I have only been a reporter for just under 10 years, so I can't speak with any real authority about what occurred before then, but I think certainly there is increasing effort on the part of those in power to control what the press has to say about them. I think that the government's attempt to subpoena newsmen and its continuing vendetta seems to be in progress by the present Administration against the press is just a manifestation of that. I think this Administration is not alone in that. Earlier Administrations did the same thing. I think it is really inevitable that people in power would try to do this. I don't think there is any way to stop them. I think that is the way that has always been in one way or another and that is the only way it will be. The only thing to try to do about it is to try to make the press immune from the government having any legal authority over the content of the news.

I think as Charles Rembar, the lawyer who has done so much in this area of the first amendment, has observed is what we are seeking now is not an attack on the principle that there ought to be freedom of the press. What we are seeking is an attempt to take away the tools by which freedom of the press is exercised and of course inside sources are absolutely vital to the most crucial kind of information.

Senator **Tunney**. I heard you say there has been more investigative reporting in the last few years by magazines and newspapers, with reporters preparing and publishing more hard-hitting investigations than formerly.

Mr. **Hume**. Yes, I think there is no question of that. I think the people in the White House would think the press is out to get them. But I think it started well before that. I think that the freedom accorded by *The Times* v. *Sullivan* doctrine has opened the door and you see investigative reporting in places where you didn't see it so much, *Harpers* and *Atlantic* have accepted this kind of thing, book publishers are. It used to be reporters involved in this thing had a terrible time getting books published and now they are receiving plenty of attention and good advances and the books are doing well. Investigative reporting or muckraking, as it is often called, is a kind of renaissance but borne not of any particular fashion but of the freedom that has been accorded by the Supreme Court's attitude of this issue of libel and other issues. I am afraid the tide may be turning and that is why we are here.

Senator **Tunney**. One of the things that impresses me is this: When you have a situation where the government, whether the administration is Democratic or Republican, doing more and more to control the news, there is an increasing need for investigative reporting to try to establish truth of what is actually being done by the government. I think that one of the reasons for investigative reporting is not only to solve the case, but also to let the people know the facts in light of the increased news management by government.

Mr. **Hume**. Yes, I think this is true.

Senator **Tunney**. I couldn't agree with you more that, in this area. Newsmen have got to be protected because I think the only way you can pierce the veil of Government secrecy is to give an investigative reporter an opportunity to get confidential tips so that those confidential tips can be developed into a tool to inform the public as to what it is.

Mr. **Hume**. I think the point can be made that the Government and especially the President has a platform from which he can reach an enormous amount of the American public at any time he wants to for as long as he wants to. He can get on television and say what he wants for as long as he wants. No one questions the need for this. Obviously, the President ought to be able to communicate with the public. I cite the President because he is the best example. There are many other examples of people in power trying to reach the electorate. But the unparalleled and unprecedented opportunity to reach the public is also an unparalleled and unprecedented propaganda to the public. I think when you consider the press releases and the Government's rosy version of what everybody is doing at all branches of the Government, I think the press begins to look like an institution that is somewhat overwhelmed and all it can hope to do is to provide some antidote to the massive doses of propaganda coming from it at all sides. That is where I think investigative reporting is critical.

Senator **Tunney**. Thank you.

Senator **Gurney**. Mr. Gora, let me pose one question to you here.

Let's assume that the civil liberties of a defendant in a criminal trial are involved. Perhaps he is accused of some sort of conspiracy to commit a crime in connection with a Black Panther meeting to use the investigative reporter matter in the *Bowe* case, and let's assume there is a pretty good case against him. Further assume that perhaps an investigative reporter has a pretty good piece of evidence that might be very vital to his defense, which the reporter got through confidential sources. What would be your recommendation to the committee in a case like that?

Mr. **Gora**. Senator Gurney, I don't think that case arises very often. It is hard to document, but I think it would be difficult to find very many instances where the reporter had confidential, highly exculpatory information, and the reporter was the only person that had that information. If those three kinds of circumstances coalesce then, as I said, I think you have a clear clash between the sixth and first amendment rights, and I think you resolve that clash, that particular clash, and that particular clash in the criminal context in favor of the defendant's rights.

We make it seem as though providing a privilege not to reveal information is something unusual, that reporters are the only ones who are asking for it. If someone comes into my office to consult with me as an attorney and confesses to me that he has committed a crime, I have a privilege, I would assume, not to reveal that information. That certainly impedes the flow of information but we accept that result because it enables attorneys to advise their clients fully and allows the clients to confer with their attorneys.

Another thing is that our system, and I think properly so, is more concerned with an innocent man being convicted than it is with a guilty man going free. Most of the procedural safeguards in the Bill of Rights recognize that kind of distinction. It has been suggested in many Supreme Court cases that it is better to have guilty men go free than to have one innocent man go to jail. So I think those suggestions are recognized by the Bill of Rights, are part of our sense of justice, and it doesn't trouble me to distinguish between a defendant's right to obtain information and a prosecutor's right.

Senator **Gurney**. You would recommend that exception?

Mr. **Gora**. If you make exceptions that is certainly one that has to be provided.

Senator **Gurney**. In some of the bills before us there shall be no exceptions.

Mr. **Gora**. I think it in part depends upon your weighing how often the situation comes up. There are hard cases, and as you are aware more than anyone else, it is difficult to envision every single case when you are trying to write general legislation. I think it would be foolish to write an exception for a hard case that rarely comes up and I think that is one of those hard cases. If there are going to be exceptions I think that should be one of them. But I am not sure the evidence shows that situation comes up enough to allow written exception into the statute.

Senator **Gurney**. You say that you are not recommending it?

Mr. **Gora**. What I am saying is this: I think it is important to determine from these hearings how often that situation comes up. I don't think it comes up very often. I think it is your judgment whether it comes up often enough to provide an exception for it. If you start opening the door to exceptions, and many of these bills have those, then I think it would be remiss not to include a specific one here where the person seeking the information relies on a specific constitutional provision. That is what I am saying. It partly depends on what you find. If it is found to be a problem then there ought to be an exception. If you are going to write an exception this certainly should be one of them.

Finally, I would say the same thing about a libel suit. If you are going to write an exception and most of these bills have one, the *Cervantes* case is an important minimal rule, and I think the rule of that case has to be part of any exception in this context. So far none of the bills I have seen do that.

Senator **Gurney**. Mr. Kilpatrick testified before the committee yesterday, and he gave some very interesting testimony. The essence was that we shouldn't do anything about legislation for two reasons, as I understood his testimony; one was if we did then we really weaken the first amendment because we say the first amendment really doesn't mean what it says, about Congress making "no law." Therefore, corrective legislation, such as this would cut the first amendment down and weaken it. There is much merit in that idea.

The other point he made, though, and I bring it up because of your mention of these two other cases, is that while he thought that the *Caldwell* case was most unfortunate, and disagreed with the Supreme Court, he felt that the courts themselves would probably correct this in point of time. These cases you mentioned here, I think are nibbling into the *Caldwell* case. what would you say about that?

Mr. Gora. As I recall the text of the first amendment it does not say the Congress shall make no law respecting freedom of the press. It says Congress shall make no law abridging freedom of the press.

Now, as to whether the courts can fill the breach, that is hard to predict. The circuit court in the *Baker* case, which is a very eloquent decision by Judge Kauffman of the U.S. Court of Appeals, dealt with the issue in the context of a civil, not a criminal action, where plaintiffs sought information from journalists and where there was really not a strong showing that that information was particularly vital to the plaintiff's case. I would be willing to guess that the Supreme Court that decided Branzburg would have decided the *Baker* case the same way as the Second Circuit. That is not a particularly hard case. While the *Cervantes* case has limited the situation in the libel context. I am not sure we can confidently predict the courts will be sufficiently responsive so that it obviates the need for legislation.

However, I would say that if I had to choose between a very weak Federal bill, either weak in its procedural provisions or weak in its substance, and taking my chances with the Federal courts, I think I would prefer the latter approach. But it is hard to make a fast judgment.

After all, lawyers can attempt to distinguish the *Branzburg* case by saying, well, that involved the grand jury and every other situation is up in the air. It depends upon how the lower Federal courts will deal with arguments based on those distinctions, but I think until we have cases which protect information in a hard context where it is a difficult situation in making a choice between a DA's claim for information and reporter's claim, until we see how some of those cases are decided, I think the Congress now is the appropriate forum to remedy the situation.

Senator Gurney. Let me pose this final question to you.

Suppose we were faced with a situation where the only kind of shield law you are going to get is one that does have a number of exceptions to it. Some members feel that may be the case, that it is not possible to have a total shield law. Do you think it would be better to not have any law at all rather than one that has several exceptions?

Mr. Gora. Senator, it is really hard to answer that question blind. As I was saying in response to Senator Tunney's remarks earlier, if a bill provides that no subpena may be issued except after a court order and hearing, given that procedure, protection would result even if you had relatively mild substantive provisions. I think a bill like that would be worthwhile. However, if the bill provides only moderate procedural protections and moderate substantive definitions, then I would rather take my chances with the courts. I think it depends on what kind of bill, what procedures, what substance.

The bill that Senator Eagleton discussed this morning is very helpful. It makes a distinction in terms of the effect on the flow of information, information obtained in confidence versus acquired in public.

If the Eagleton type approach were adopted by Congress I think that would be a healthy approach. It would protect the core of the reporters' function without resolving some of these fringe issues of the reporters who happen to fortuitously witness a crime in the streets.

I think the answer to your question is that it depends on what the final bill provides.

Senator GURNEY. Thank you.

Senator TUNNEY. Mr. Chairman, I just have one observation. I think it is rather fascinating that at the time we see an increasing desire by Government to cut back on the ability of a newsman to protect his sources, we see increasing use by Government of the doctrine of executive privilege to save the Government the embarrassment of having its high officials testify as to what is going on in their departments. It is an interesting crossover that is taking place, and it seems to me to demonstrate once again that Government is doing everything that it can to try to manage news and to try to have the public accept as factual only that which the Government desires to have disseminated.

Senator ERVIN. Well, that is, I think, an attribute to Government. In other words, I find that so many Government officials think that freedom of the press should mean freedom to appraise but not to dissent. It is quite a human reaction.

Senator TUNNEY. Very human, but I don't think very good.

Senator GURNEY. I can't help but observe that some of the executive privilege recently exercised has to do with politics and really not Government. I think if the Congress were not a Democratic Congress we would not have some of the problems we have. I refer back to the ITT hearings, in which I think there was a pretty full disclosure by a whole lot of people on the part of the Government as to what went on. There was no reluctance to testify as to what went on in that crucial hearing and to make sure we had the full benefit of all the information we could.

Senator ERVIN. Well, I think government is a creature of politics and I am for the freest and fullest discussion of both government and politics. I don't think you have good government unless you have a lot of political sparring.

Senator GURNEY. Depends on whose ox is being gored.

Senator ERVIN. Well, the ox that is being gored naturally doesn't appreciate it.

Thank you, gentlemen, you have given us a most interesting discussion.

[Prepared statement follows:]

PREPARED STATEMENT OF JOEL M. GORA, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

My name is Joel Gora. I am Staff Counsel of the American Civil Liberties Union, and I appear here today on behalf of the ACLU. I am grateful for the opportunity to present our views on proposed legislation to protect newsmen in their task of gathering, interpreting and communicating information on the public events of the day.

With me today is Mr. Brit Hume, a noted journalist and the author of *Death and the Mines*. Based on his experiences as a working journalist, Mr. Hume will suggest to the Committee why the members of the media need to be protected from compulsory disclosure of their confidential sources and information, so that they may perform their constitutionally mandated task of informing the American public. I will attempt to suggest the legal bases for affording protection to newsmen and to evaluate some of the proposed legislation pending before you.

It was just three years ago this month, in February 1970, that the initial skirmish in the battle over newsmen's "privilege" took place when grand jury subpoenaes were directed at Earl Caldwell. The ACLU was there, urging two simple propositions: First, that the primary function of the press is to inform the public; second, that the press cannot perform that function unless journalists can protect their information.

The first proposition has now become axiomatic. In the current debate, everyone takes as his initial premise the concept that the core purpose of the first amendment's guarantee of a free press is to insure that the American people will be fully informed about questions of general or public interest, and will thereby be better able to govern themselves.

Of course this idea is not particularly startling, for it was the common understanding of the men who wrote the First Amendment. James Madison believed that: "A popular government without popular information or the means of obtaining it, is but a prologue to a farce or a tragedy, or perhaps both." And Thomas Jefferson, perhaps exaggerating to make his point, suggested that, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate for a moment to prefer the latter."

That understanding—that the main reason for giving the press constitutional protection is so that it may inform the public and fuel the processes of democratic government—has provided the basis for much of our first amendment jurisprudence. See, *e.g., Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Estes* v. *Texas*, 381 U.S. 532, 539 (1965); *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 392 (1969). And it was most eloquently expressed by Mr. Justice Black, in what proved to be his final opinion:

"In the First Amendment the founding fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bear the secrets of government and inform the people." *New York Times Co.* v. *United States*, 29 L.Ed. 2d 822, 826–7 (1971) (concurring opinion).

The validity of the second proposition—that the press cannot discharge this constitutional responsibility unless journalists can protect their information—is what these hearings are all about. The prevailing opinion in *Branzburg* v. *Hayes*, *408* U.S. *665* (1972) rejected this proposition. But in a number of respects the reasoning is unpersuasive.

First, it assumed that a journalist called before an investigating agency stands on the same footing as any other witness asked to provide information. Yet, the first amendment singles out the press as a very special and favored group in our society, a status constitutionally afforded to no other profession or function.

Second, the decision glosses over the fact that our law recognizes a wide variety of evidentiary and testimonial privileges which frustrate the quest for factual information. The informer's privilege, the lawyer-client privilege, the priest-penitent privilege, the husband-wife privilege, the psychotherapist-client privilege, to name a few, exist in order to foster certain sets of confidential relationships. The paramount interests advanced by a journalists' privilege are surely no less important than those. Indeed, the executive branch itself asserts a great number of such privileges—for informers, for "state secrets," for executive advice.

Finally, and most importantly, the decision is insensitive to the systematic importance of confidential relationships in the process of newsgathering. Despite the testimony of dozens of seasoned journalists, describing the manner by which the process works, the Court concluded that compulsory disclosure of information would not inhibit the process and that prosecution of criminal activity was more important anyway, regardless of the effect on the free flow of information to the public. Justice Stewart's dissent noted that the majority seemed to be asking newsmen to prove their claim with a kind of precision rarely required in the First Amendment area.

These hearings afford an opportunity to make that record, to engage in legislative fact-finding upon which strong legislative protection can be based.

Let me turn then to the more specific issues with which the Committee is concerned.

IS THERE A NEED FOR LEGISLATION?

We think the answer is clearly yes.

In the six months since a majority of the Supreme Court refused to find in the First Amendment a strong protection for journalists' information, several reporters have gone to jail and several others face that dismal prospect in the near future. These various episodes have been described by Mr. Hume in a *New York Times Magazine* article, "A Chilling Effect on the Press" (December 17, 1972, p. 13), and have been documented in a recent report by the Reporters Committee for Freedom of the Press. Indeed, many of these journalists threatened with incarceration for attempting to protect their information have appeared before this and other congressional committees to describe their experiences.

What is most disturbing about this trend is the kinds of stories which these reporters were attempting to cover and which led to subpoeaaes and harassment. For example:

Two Buffalo reporters subpoenaed by a grand jury to tell about events during the Attica rebellion;

A Los Angeles radio reporter called because he was investigating corruption in bail practices;

Peter Bridge, jailed for refusing to reveal sources for a story on municipal corruption in Newark;

Three Milwaukee reporters subpoenaed because of articles on political contributions by contractors;

Three South Carolina reporters asked to tell the identity of inmates who had described mistreatment in a county jail;

A Tennessee reporter asked to disclose similar information about mistreatment in state children's hospital;

A St. Louis reporter asked by a legislative committee to reveal sources of a story about a judge.

And of course, the three reporters involved in the Supreme Court case, Paul Branzburg, Earl Caldwell and Paul Pappas, were working on stories about radical politics and the drug culture.

All these journalists were attempting to inform the public about some of the most vital issues, local and national, which confront our nation. And in order to do that most effectively, these reporters required the ability to protect their sources and information. Whether or not all people involved in the newsgathering process require such a capacity is beside the point. The central issue is that those who do need such protection are the best journalists we have—the investigative reporters who expose corruption among public officials, who explain and criticize public policy, who illuminate the activities and power of criminal elements, who explore the continued need for prosecution of crimes without victims, who explain counterculture and dissident groups to the rest of society. In short, those reporters who most rely on confidential relationships and information and most require protection are those who inform us all about the workings of government and the vital issues of our time.

And not only has the Supreme Court's failure to recognize this vital First Amendment phenomenon resulted in threatened confinement for a number of journalists, but it has generated a variety of more subtle, but equally dangerous inhibitions. For, as Justice Stewart predicted, a certain amount of self-censorship has become evident, and as Justice Douglas observed, a signal has been given to publishers and editors that they should exercise caution. It has been documented that a number of news stories have been killed or not pursued precisely because of the lack of protection. See Brit Hume, "A Chilling Effect on the Press," *New York Times Magazine*. (December 17, 1972, p. 13): A. M. Rosenthal, "Save the First Amendment!" *New York Times Magazine*. (February 11, 1973, p. 16). Add to the threat of subpoenas all the other pressures on editors and journalists to be "responsible," and the end result will be a timid, not a robust press.

Fortunately, some courts have responded to the crisis in post-*Branzburg* decisions which have afforded a certain amount of protection to journalists. In *Baker v. F & F Investment Co.*, No. 72–1413 (Decided December 7, 1972), the Second Circuit held that a journalist who wrote a story about block-busting practices could not be compelled to reveal his sources to plaintiffs challenging such practices in a civil action. In reaching that conclusion, Circuit Judge Kaufman observed:

"Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis. . . . The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting, the dividends of which are revealed in articles such as Balk's, threatens freedom of the press and the public's need to be informed. It thereby undermines values which traditionally have been protected by federal courts applying federal public policy.

It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case."

See also, *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (holding that sources could not be revealed in a libel suit except on a strong showing of malice).

These decisions are encouraging. But resolution of the issue on a case-by-case basis is no longer adequate. What is required is strong, comprehensive legislation by the Congress, affording protection to journalists and the First Amendment values with which they are entrusted.

SHOULD THE LEGISLATION REACH BEYOND FEDERAL PROCEEDINGS AND AGENCIES?

Here, too, we think the answer is yes, and some of the proposed bills so provide.

First, I think that Congress has the power, under the Commerce Clause or under the First Amendment, in combination with sections 1 and 5 of the Fourteenth Amendment, to write legislation which will cover state proceedings as well. See, *M'Culloch v. Maryland*, 4 Wheat 316, 421 (1918). So long as the Congress "could perceive a basis" for its judgment that the legislation is necessary to implement First Amendment and Fourteenth Amendment guarantees, or the free flow of information in commerce, it can act in this area. See, *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Second, I think the exercise of that power is necessary. Most of the journalists who face the possibility of incarceration do so by virtue of state process. Ironically, in many of those cases, there were supposedly protective state laws which were given a narrow judicial interpretation. The kind of news reporting which might lead to a state grand jury subpoena—investigations of city hall corruption, for example—is just as valuable to the public as reporting which might interest a federal grand jury. Thus, while almost 20 states have some kind of legislation, there is a strong need for uniform, national legislation which will provide protection and certainty to all working journalists.

Moreover, if reporters in a particular state are protected against federal subpoenas, but not state process, we may see the creation of a kind of "silver platter" problem, where federal officials persuade their state counterparts to launch an investigation.

Finally, if federal legislation is made applicable to the states, then it should be made explicit that federal preemption extends only insofar as state law does not provide greater protection. There is a provision to this effect in S. 750, and I would recommend that approach to the Committee.

WHO SHOULD BE COVERED?

We think that the definition of who is entitled to statutory protection should be broad enough to encompass authors of books as well as journalists for news media. An investigative reporter performs the same function whether the end product is a newspaper column, a magazine article, or a book. As Victor Navasky has suggested: "A nonfiction author, at least if he is dealing in contemporary affairs, is really just a slow journalist, perhaps more careful to document because of the hard covers, perhaps not, but in any event, no less connected to the public's right to know." And, of course, some of our most important "muckraking" journalism has been in the form of a book.

Similarly, statutory definitions should also include journalists working with the "alternate" press—the underground press and the press which services such groups as college students, high school students, soldiers and prisoners. This alternate press, frequently the target of government harassment, performs just as vital a function as the "establishment" press, with none of the same institutional resources to call upon in the event of attack.

Some of the proposals before you too, severely limit the availability of protection by seeming to afford it only to regular members of the established working press. We would much prefer general wording of the kind contained in S.J. Res. 8, which protects "any person . . . who is independently engaged in gathering information intended for publication or broadcast."

HOW SHOULD THE PROTECTION BE INVOKED?

Whatever type of legislative protection emerges from the Congress, persons seeking to divest such protection—either on the ground that information has not been acquired by one who is entitled to such protection (if the privilege is absolute) or on the ground that an exception applies (if the privilege is qualified)—must have the burden, and a heavy one, of establishing his contention. And, of course, that issue must be litigated before an appropriate court.

Most of the bills before you take this approach, and it is salutory. The procedures should be as cumbersome as possible to insure that process will not be directed frivolously at journalists. And requiring a court order will eliminate many of the abuses caused by the indiscriminate, ex parte issuance of subpoenas.

Similarly, most of the bills providing a qualified privilege require a preliminary showing of (1) probable cause to believe the journalist has information clearly relevant to a specific crime and (2) that the information cannot be obtained in any other manner. Such provisions are useful and acceptable and reflect traditional constitutional doctrine that First Amendment freedoms may never be infringed absent an initial showing that an important governmental objective cannot be accomplished in any other manner. See, *e.g., Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972).

WHAT KIND OF PROTECTION SHOULD BE PROVIDED?

The issue which has caused the most controversy in whether any privilege should be "absolute" or "qualified." We believe that where a journalist obtains information, in the course of performing his journalistic function, compelling him to disclose that information is rarely, if ever, justified. The interest in a free flow of information to the public is so paramount that there are few countervailing interests capable of overcoming it.

First, let me say that most of the qualified privilege bills before you, in their general thrust, provide a minimally acceptable amount of protection for the newsgathering process. For example, those bills which afford complete protection in connecion with administrative and civic proceedings, while only a qualified protection in criminal cases, embody the sound realization that rarely do the stakes in civil litigation justify the encroachment on the newsgathering process.

The main problem with formulating a qualified privilege is how to insure that the limited exception will remain limited and not swallow up the rule.

For example, an exception for cases where there is "a compelling and overriding public interest in the information" is too broad and flexible. Presumably, for example, there is such an interest in prosecuting drug peddlers or corrupt governmental officials. Yet the public interest in the flow of information about those issues and problems is even greater. With such an exception, a journalist who uncovers a bureaucratic scandal could probably be compelled to disclose his information or sources.

Similarly, even the seemingly narrow exception to prevent imminent danger "of foreign aggression, of espionage, or of threat to human life" (S. 637) might have broader loopholes. The grand jury which summoned Earl Caldwell was investigating alleged threats on the life of the President. And the alleged sources of the Pentagon papers have been prosecuted for espionage.

Because of the uncertainties inherent in a qualification of the privilege, we are extremely sympathetic to the absolute approach embodied in S.J. Res. 8 and S. 158. While we appreciate the concern for providing some authority to question journalists in extreme cases, we wonder whether, as a practical matter, those "hard" cases arise with sufficient frequency to justify the dangers of statutorily providing exceptions. For example, where a reporter has gained access to information about past crimes of a serious nature, rarely will he be the only source of evidence. And even in the unlikely event that he is, the general interest in the free flow of news should prevail. We tolerate similar consequences in order to advance the purposes of the Fourth Amendment (the exclusionary rule), the Fifth Amendment (the privilege against self-incrimination), and the Sixth Amendment (the lawyer/client privilege). We see no reason why the general interests embodied in the First Amendment should be any less compelling.

Similarly, perhaps the hardest hypothetical case is where the journalist has knowledge concerning a planned, *future* crime of violence. But such situations would rarely arise. As a practical matter, grand juries or courts do not usually investigate future crimes, and, unless they are on a fishing expedition, they would be unlikely to subpoena a journalist.

Finally, let me say a word about two special problems.

First is the matter of defamation suits against media or journalists. Most of the bills before you have an exception allowing the disclosure of confidential sources or information in such actions. The problem is that such an exception opens the way for great abuse, with frivolous libel suits being filed merely to identify and then harass the sources of a story. If any libel exception is to be written, it must at the very least embody the rule in the *Cervantes* case, holding that the libel plaintiff must make an extremely strong showing ofmalice before the journalist may be compelled to disclose his source.

Second, what is to be done when a journalist possesses information highly exculpatory to a criminal felony defendant? Here, there is a clash of two constitutional protections—the journalist relying on the First Amendment and the defendant relying on his specific textual Sixth Amendment right to compulsory process. I would suggest that if you are going to have any qualifications on the privilege, then surely this should be one. Where a journalist is the only man who can exonerate a defendant, then the Sixth Amendment claim should prevail. (When a journalist is the only one who can convict a defendant, there are no equivalent constitutional or policy reasons for overriding the First Amendment interests in a flow of information to the public.)

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Stanford Smith.

Senator ERVIN. I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your views in a field in which you are most knowledgeable.

STATEMENT OF STANFORD SMITH, PRESIDENT, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, ACCOMPANIED BY ARTHUR B. HANSON, GENERAL COUNSEL, AND LEN H. SMALL, CHAIRMAN, COMMITTEE ON GOVERNMENT RELATIONS

Mr. SMITH. Thank you, Mr. Chairman. I will have my statement put in the record and summarize it.

Senator ERVIN. It might be well to identify the gentlemen with you for the record.

Mr. SMITH. I am accompanied this morning by ANPA General Counsel Arthur B. Hanson, on my left, and by fortunate circumstance I am also able to be accompanied by Len H. Small, chairman of our committee on government relations and president of the small newspapers group in Kankakee, Ill., where he is editor and publisher of the *Kankakee Journal*.

Senator ERVIN. Thank you. The statements will be printed in full after your statements in the body of the record.

Mr. SMITH. I have appeared before this committee before, but I would like to reiterate and join with the other witnesses in expressing our deep appreciation to you, Mr. Chairman, and the members of this subcommittee, for undertaking this important work so early in the new session. This problem is extremely complex and that is being very well illustrated by the testimony that you are hearing. We are grateful you are starting it so promptly.

When I testified before your subcommittee in October 1971, I said that the concept of the free press withstood the test of time and the storms of challenge remarkably well. I still believe that, but the Supreme Court decisions in the *Branzburg*, *Caldwell*, and *Pappas* cases came after that. Rather than go into supporting arguments in favor of the bill that you have already heard, I should like to describe to you the actions of our association and how we sought to collaborate with other media organizations for the purpose of presenting from all the organizations their various shades of opinion, but based on knowledge and some analysis of the complexities here that would be most useful to your subcommittee.

After the Supreme Court decision we invited representatives of all of the media organizations and other groups that had expressed concern about this problem to join with us in a series of ad hoc meetings to analyze the problem and determine if we could, whether there was any consensus within the media organizations and others as to what kind of legislation, if any, we thought would be appropriate. Those meetings continued over a period of many months, and it is no surprise to anyone that we started out with the position of many different points of view and many different solutions to the problems resulting from the impact of the recent Supreme Court decision.

We had wonderful cooperation from other media organizations. You have already heard the various shades of opinion within the media. There never will be, I am sure, nor should there be any unified single point of view within the media, but at least we should proceed from a common understanding of what the facts really are. The language of the Supreme Court decision played an important part in our deliberations. This enabled us to get past the argument that we should not seek legislation but instead rely on the courts or on the protection of public opinion. It is far too late for that. The language of the court also helped lead us to the conclusion that an unqualified privilege law is appropriate. There is no consensus among either media executives or members of the Congress on just what qualifications would be appropriate, if any, in a qualified bill. Some changed their views. Many fear that any attempt to itemize the qualifications would actually cause more controversy and more litigation, and such qualifications themselves would be a limitation on freedom of the news media.

In August we issued a study of legislation that was then ending in the 92d Congress on this issue. There were many different bills under consideration at that time and it was necessary to analyze all of them to see the differences in their respect. The question of State law immediately came up and we did an analysis of the shield laws of, at that time, 18 States. That study was completed in November and subsequently updated.

You now have before you bill S. 158 by Senator Cranston of California. We specifically endorse and urge approval of that bill.

I do think it is worth repeating to refer to a sentence of the Supreme Court decision, and I quote:

> Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.

We believe the enactment of something reasonably approaching S. 158 would be an appropriate action for the present Congress. If it should turn out, and we do not believe it would, that there were abuses or there were additional problems that needed to be dealt with, we believe the Congress could then take care of that. We know we have serious problems today. That has been amply demonstrated by some of the witnesses who have already testified before you.

When I appeared here in October 1971, I closed out my testimony by quoting Judge Learned Hand. His words have such a profound meaning to this paramount issue. Judge Hand said of the first amendment that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly, but we have staked upon it our all."

Mr. Chairman, I would like to permit our general counsel now to offer for the record the studies that we have contributed to this general analysis of the problem by the media organizations to whatever extent you would like to have these studies.

Mr. HANSON. Mr. Chairman, based on some of the discussions taking place I would like to offer a document dated February 8, 1973, which the staff has received, entitled "Possible Basis for Enactment of a Comprehensive Federal-State Shield Law." This was done specifically in consultation with Mr. Baskir and Mr. Snider when we discussed these problems over the months that have gone by, and this question was raised as a very serious question that has to be resolved by the Congress.

I call your attention to page 2 where we say:

> Congress derives such authority given it under the Commerce Clause; second, Congress derives such authority under the power given it under the first amendment and the privilege and immunity and due process and enforcement clauses of the 14th amendment. Under the authorities of either of the sections of the Constitution, the Supreme Court and a majority of Congress has authority to enact a comprehensive shield law.

We believe we have cited for you the pertinent recent decisions that have been handed down within the last several years which reflect light upon this whole subject, and we ask that this be incorporated in the record of the hearing.

Senator ERVIN. Yes, that is a very fine document and it will be printed in full in the record.

[The document referred to is printed in the appendix.]

Mr. HANSON. Secondly, we have prepared under date of February 15 an analysis of all newsmen legislation before the 93d Congress as of that date. There have, of course, been some bills introduced since. We would ask that this document be made a part of the report. We believe again it will be a helpful study document.

Senator ERVIN. That will be done.

[The document referred to is printed in the appendix.]

Mr. HANSON. The other thing that we did was this state shield law study, the first portion of which is dated November 10 and the addendum January 25, 1973, which involved recent actions in California and New Jersey. The reason we offer this is that it illustrates the diversity and complexity in which the states have addressed themselves to this and emphasizes the importance of the Congress enacting a comprehensive preemptive statute, and we ask that be included.

Senator ERVIN. That will be done.

[The document referred to is printed in the appendix.]

Mr. HANSON. We, of course, have given Mr. Baskir and your staff copies of the earlier study, but we don't believe it is pertinent now. We are dealing with what is before you now. They have the file, but I don't believe the record should be crowded with that.

I will be glad to answer any questions.

Senator ERVIN. Thank you.

Mr. Smith, I recall when you testified in the previous hearings that you and I agreed in the *Caldwell* and *Branzburg* cases that it would be better to work out these problems under the first amendment, and it is unfortunate the Supreme Court didn't take as wise a view of the problem as was taken by the Court of Appeals in the *Caldwell* case.

Mr. Smith. That is correct. Neither you nor I anticipated the decision as we discussed it at that time.

Senator Ervin. These problems seem to be multiplying instead of decreasing. It is rather tragic to see so many newsmen go to jail as a result of something that was not done.

I think drafting legislation in this field illustrates Learned Hand's concept of the first amendment—that the truth is more likely to emerge from the multiplicity of opinions. We certainly have a great multitude of opinion on what kind of legislation we need. I have tried to write bills three or four times myself but never have come up with one that is satisfactory. I haven't seen any bill that quite satisfies me. But I think it is a most important thing to come up with a bill as simple, as understandable as possible, that deals with the problem adequately. It is going to be very difficult to get a bill that does that.

Mr. Smith. Yes, sir; my reaction to that would be to say that we have great faith in the legislative process. We don't come here saying that absolutely every word in S. 158 is chiseled in stone, but it is a good starting point for the absolute approach which is the one that we favor. But you are getting in the legislative process here some very interesting suggestions that we have great confidence in this committee to weigh all of these things and come up with legislation which will not be so weak that we would then prefer that you not legislate at all.

Senator Ervin. Well, I think the legislative process illustrates, rather tends to corroborate, Judge Learned Hand's views. I hope the many suggestions and the differences of opinion will strike some sparks in the committee to solve this problem as satisfactorily as possible.

Senator Tunney. Mr. Chairman, I have just one question and that relates to the Eagleton bill. In the Eagleton bill there is an attempt to provide procedural safeguards by making it more difficult to issue a subpena, and of course there are substantive safeguards as well, although there are qualifications and privileges.

Do you have any opinion as to whether or not the Eagleton approach is satisfactory?

Mr. Smith. I would rather ask our counsel to answer that because it involves differences between types of draftsmanship.

Mr. Hanson. Senator, I believe that the bill offered by Senator Eagleton certainly represents the viewpoint that I would expect a former prosecutor to represent; namely, to let courts decide who should get a subpena. I personally am in favor, if there be a qualification of this nature, to have one of the type that Senator Eagleton offered because I am reminded of a case decided in the District of Columbia Court of Appeals this past week which rejected a subpena of the third assistant clerk of the D. C. Human Relations Commission against the National Geographic Society. They unanimously reversed it but not because it was procedurally bad but because it was too broad. I think abuse of subpena in the hands of bureaucracy is one of the worst abuses in our hands today.

Senator Tunney. I agree with that.

Senator Ervin. I have always loved simple procedures and while there are many admirable qualities in Senator Eagleton's bill, I don't agree with him in getting the subpena in advance of the court. I think that would be rather cumbersome. You should provide alternative methods by which the question can be raised. If the newsman thinks it is so crucial he ought not go to court at all, he should file a motion to quash the subpena. I think that would form protection.

I do agree there are too many subpenas issued in this field, but I believe it is best not to create too cumbersome a procedural process. It is simple for a newsman to object when you call on him to testify. That is a simple procedure well established in all other areas. But I do think there ought to be a procedure where the subpena can be challenged in advance of the trial and in advance of the newsman going to go before the grand jury or the court.

Mr. **Hanson**. Mr. Chairman, before you conclude your hearings we hope to take your bill and Senator Eagleton's bill and other bills as we go along, because this is of great importance, and try to give the staff and committee the benefit of analysis of this type of proposition. Obviously, we got your bill yesterday and Senator Eagleton's last night. So they are coming at us pretty fast. It wouldn't be fair to try to make a flatout judgment as to which is better. I agree, if you make it too complicated it becomes a court contest and we forget all about a fair trial or what have you. I think that is the problem.

Senator **Tunney**. Yes, of course, I tend towards an attitude of mind that is to grant a privilege to be given to newsmen. So I am not quite as concerned as the chairman is with making the subpena procedure cumbersome. I think by making it cumbersome, the situation of district attorneys and U.S. attorneys would be less inclined to attempt to issue them.

Mr. **Hanson**. Our problem in the last year has been much more prevalent in the States than with the Federal Government, but I would remind us all that Attorneys General and Administrations change. Just as you have guidelines created by the present Attorney General's office, why you might in the future find those guidelines done away with, and I am not very satisfied with the guidelines.

Senator **Ervin**. Neither am I. That is the reason I hoped the Court would have taken a more—well, I shouldn't use the word "enlightened" view, but——

Mr. **Hanson**. You don't find disagreement here, Senator. It might interest you to know we were one of two organizations who filed a brief as *amicus curiae* in the *Caldwell* v. *Pappas* and *Branzburg* cases which stated there should be an absolute privilege in the field not to the newsman but to the information which is the public's information. I don't consider this a privilege to the newsman.

Senator **Ervin**. I have often said that I thought the first amendment was put in the Constitution for two purposes—one of them, a philosophical purpose to make Americans free from tyranny over the mind, and the second was to make our governmental institutions function properly. I think that the freest possible flow of information through the news media is essential to accomplish both of those purposes.

Mr. **Hanson**. I have lived my life with that belief, Senator.

Senator **Ervin**. Thank you very much. I appreciate very much your fine contribution in this area.

[The prepared statement follows:]

Statement by Stanford Smith, President, American Newspaper Publishers Association

Mr. Chairman and members of the subcommittee, the American Newspaper Publishers Association welcomes the opportunity to appear before this Subcommittee to state our views on the important matter of protecting newsmen's sources of information and insuring the free flow of information to the American public.

My name is Stanford Smith. I am President and General Manager of ANPA with headquarters in Reston, Virginia. I am accompanied by ANPA General Counsel, Arthur B. Hanson. ANPA is a non-profit association whose members are the owners of more than 1,080 daily newspapers representing more than 90 per cent of the total U.S. daily newspaper circulation. Our association is concerned with all matters of general significance to the profession of journalism and the daily newspaper publishing business. The issue before you today is fundamental to the press and the public interest and we support you in conducting these most important hearings.

Gentlemen, the heart of the matter is this: does the press, in going about the business of keeping the people informed, have the right to refuse to disclose sources of information when a newsman secures such information only after a promise of anonymity to the source? Do newsmen and their employers have the right to refuse to submit to subpoena of internal memoranda, reporters' notes and other unpublished material for the same reason?

We believe the news media do have such a right and that the public interest requires it. We contend that this right exists under the Constitution, and we so argued in our amicus curiae brief to the U.S. Supreme Court in the Branzburg, Caldwell and Pappas cases. Unfortunately, the Court held otherwise and invited us to come before the Congress.

The Court said the First Amendment in no way automatically shields newsmen from subpoena. The 5–4 decision also said "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to *fashion standards and rules as narrow or broad as deemed necessary* to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate."

As a result of studies and continuing consultations with other newspaper and broadcast organizations, the ANPA Board of Directors on December 1, 1972, voted to support Federal legislation which would afford unqualified privilege from subpoena of reporters and unpublished news media materials in both Federal and state proceedings. Our Board of Directors adopted this policy position only after devoting many hours of study to this problem over the past three years.

I believe you will want us now to go into further detail about how and why this policy decision was reached. To do so we must briefly place in its historical perspective the American concept which provides for a free flow of information to the public.

What we are discussing here is the public interest in protecting the right of the press to operate in an atmosphere free from intimidation, free from the threat of incarceration and free, most of all, to accomplish its function of informing the people.

In previous testimony before this Senate Subcommittee I discussed the historical background of how the operation of a free press came about in this country, so I will not repeat that history. Suffice it to say we all understand that when the framers of our Constitution drew up that great document they had in mind the establishment of a press that was free from the threat of government sanction and free to report to the people information which all Americans have a right to know.

It is important to point out again that the original idea for a free press in this country came not from those in the publishing business but from persons in various walks of life who knew the dangers to all individual liberties if there is no freedom of the press or freedom of speech. We must stress this point time and time again. Freedom of the press does not establish a privileged class for those who disseminate news, as some have suggested, but rather it is essentially for the benefit of *all* the people. Only the Congress can deal with this problem now.

The language in the Supreme Court decision played an important part in our deliberations. It enabled us to get past the argument that we should not seek legislation but instead should rely on the courts or on the vague protections of "public opinion." It is far too late for that.

The language of the Supreme Court also helped lead us to the conclusion that an unqualified privilege law is appropriate. There is no consensus among media executives on just what qualifications would be appropriate in a qualified privilege bill. Some who initially favored such a bill have recently revised their views. Many fear that any attempt to itemize the qualifications would actually cause more controversy and more litigation and that such qualifications would themselves be a limitation on freedom of the news media.

We recognize that some fear an unqualified privilege would lead to abuses by the media themselves. We believe those fears are groundless. Furthermore, the Supreme Court's language clearly invites the Congress to enact legislation "as narrow or as broad" as it deems necessary and "to re-fashion those rules as experience . . . may dictate." If you enact an unqualified privilege law and there should be abuses (which we do not believe would occur), you could then enact whatever amendment was needed just as the Supreme Court has suggested.

What we are stating then is that the Congress should act boldly on this legislation which is so vitally necessary at this time.

Since our testimony in 1971 and after the Supreme Court decision, ANPA has continued to play the leadership role in a series of meetings with representatives of many other organizations that had expressed an interest in helping solve these problems. We invited all such organizations to participate.

Included in these consultations were the American Society of Newspaper Editors, Sigma Delta Chi professional journalism society, the National Association of Broadcasters, National Broadcasting Company, Columbia Broadcasting System, Radio and Television News Directors Association, the Newspaper Guild, the Association of American Publishers (book publishers), the Reporters Committee for Freedom of the Press, American Civil Liberties Union, and the organizations involved in the three cases which went to the U.S. Supreme Court.

On August 31, 1972, ANPA issued a study of legislation then pending in the 92nd Congress which dealt with this issue. We have supplied copies of that study for your consideration. This study became one of the basic documents in our consultations with other media organizations.

We then issued a detailed analyis of the existing shield laws of 18 states. That study was completed in November of last year and has been recently up-dated. I also offer that study for your consideration.

Both of these studies served to demonstrate the complexity of the problem to the other media organizations participating in our consultations.

Our purpose was to ascertain opinion on what form of legislation should be supported or proposed. The original group continued its consultations and then designated two sub-groups to draft a suggested form of legislation. These sub-groups met on several occasions and finally a draft bill was prepared. We submitted that draft bill to you, Mr. Chairman, by letter on December 30, 1972. It is now before you as S. 158 by Senator Alan Cranston of California.

The ANPA specifically endorses and urges approval of that Bill.

Gentlemen, if you qualify such legislation, what you really would be saying is that the people could be informed only in certain cases. And those certain cases are those which the government allows the press to report about. We find this type of situation to be truly intolerable.

The question has been raised of what would happen in times of national crises or in cases of national security. We should all remember that the history of World War II was an outstanding demonstration of the willingness and ability of the press to cooperate with the government when necessary to achieve a satisfactory balance in reporting. But where the courts or the prosecution intend to use the press as an investigative arm or to gather testimony during so-called "fishing expeditions," then we believe the line has to be drawn.

Another important aspect to our proposed measure is that it guarantees protection at both of Federal and State level. I believe that information on the complexity and diversity of present state statutes and the fact that 32 states lack *any* protection at all justifies this section of the Bill.

Our study of the 18 state laws was completely objective in nature. We set about to simply detail the high points of each statute rather than to determine the statutes' effectiveness. What we found was a number of complex, often vague, rules by which newsmen were granted either absolute or qualified privilege in testimony before a court. In some cases where states claimed to provide "absolute" protection, that protection extended only to the source of information but not to the information a newsperson may have gathered. Additionally, we discovered a variance in terminology. What the term "newsman" was construed to mean in one state was not necessarily similar in another state.

Information supplied to you by the Department of Justice and subsequently brought up to date by the Department showed that the Department was asked on 15 occasions in the last two years to issue subpoenas to obtain reporters' notes, names of confidential sources of broadcasters' filmed outtakes.

We also know there have been many more subpoena attempts at the state level. The Freedom of Information Committee of the Associated Press Managing Editors Association is now conducting a state-by-state survey to gather detailed information on the number, type, and disposition of such requests. ANPA and the American Society of Newspaper Editors are cooperating in that effort. We have also made inquiry to the Attorney General of each of the 50 states.

Some persons have taken the view that since the number of subpoena attempts does not seem numerous, there is no cause for alarm from the press. The fact is, Mr. Chairman, that any subpoena which places a reporter in the position of having to reveal his source of information is cause enough for serious concern. If only one source dries up, then the American people have lost a vital part of the freedom which was promised in the Constitution.

Additionally, the erosion of this freedom does not have to come in one fell swoop, but rather in what seems to be small, insignificant amounts. If action is not taken now, this country may some day wake up to a press that must rely only on what government agencies hand out, that can not effectively investigate corruption or must serve as a governmental investigative agency. That situation is certainly not desirable, but it is not difficult to conceive in today's context.

In response to the question "Do reporters feel intimidated by the threat of subpoena?" I think that can best be answered by stating that several have already been sent to jail and others have expressed the opinion that they would rather go to jail then reveal their sources.

But I submit that if news people have already considered the possibility of going to jail, then certainly they are feeling pressure from some quarters.

I believe that if we start with the premise that the American people are entitled to know all the information that is available, either through official channels or through confidential sources, then we must conclude that the vehicle used to disseminate that information, namely the press, must not be hindered in gathering that information.

Beginning with the case of John Peter Zenger, the press has exposed many misdeeds of both political and civic figures and, in most cases, once the information was known the citizenry or the government acted to institute reforms.

This is an important function of the press—to seek out and find corruption and to bring that corruption to the attention of the American people. If the people decide not to act on the information, so be it. But first they must have that information.

If the press can be constantly subjected to government harassment and threat, then the people can never be truly aware. When we ask for an absolute privilege, what we are truly seeking is a reaffirmation of the already established right of the American people to be informed, that right being embodied in the First Amendment.

I think there is need here to speculate on what might happen if newsmen are forced to operate under restrictive codes which inhibit the gathering and dissemination of information.

The press in this country has always played the role of the transmitter of information to the public. That is its duty, its obligation and its sole purpose for existing.

There has always been a common understanding that in order to accomplish the task of reporting news, members of the press were free to utilize sources of information that had to remain confidential. Only recently has this fact of life been aggressively challenged.

Because newsmen have been ordered into court or before other governmental bodies, because sources were in danger of being exposed, the process of conducting investigative reporting has been seriously impaired. Sources that were previously willing to give reporters information are now hesitant because they might be revealed.

These circumstances have definitely diminished the reporter's role in uncovering information on crimes or other misdeeds.

But further, it is the citizens of this country who will eventually feel the effect on what information is transmitted by the media.

If the traditional freedom of the press is eroded and if the people in the media are threatened with jail terms, then the outcome will be a country where the people do not have all the information necessary to make intelligent, rational decisions.

When I had the privilege to appear before this distinguished Subcommittee in October of 1971 I closed my testimony with a quote from one of America's most eminent jurists, Judge Learned Hand. I think it is important to reiterate what he said because his words have such a profound meaning to this paramount issue which faces the American people today. Judge Hand said of the First Amendment that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."

"To many," Judge Hand wrote, "this is, and always will be folly; but we have staked upon it our all."

Mr. BASKIR. Mr. Chairman, our last witness today is Prof. Vince Blasi of the University of Michigan Law School. He is the author of a report called "Press Subpoenas: An Empirical and Legal Analysis," involved with press subpenas.

Senator TUNNEY. Mr. Blasi, it is a great pleasure to have you here. You are a recognized scholar in this area and I am looking forward to hearing your testimony.

STATEMENT OF VINCE BLASI, PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. BLASI. I will keep my remarks very brief.

In the last few years I have studied this problem in considerable detail. I have interviewed Peter Bridge and Earl Caldwell and Bill Farr and Paul Branzburg and many of the other reporters who have been subpenaed. I have done a number of surveys and I have written extensively on the constitutional issue and am now in the process of drafting a shield law for the Conference of Commissioners on Uniform State Laws at the State level, so on any of these questions I would be glad to offer you my observations.

Senator TUNNEY. Could I ask you, are your ideas contained in any of the bills before the committee?

Mr. BLASI. Well, I have with me the most recent draft which I have done for the commission. It is my own work. It is not a consensus they have reached, but it is a current draft in progress. I have provided the committee with copies of that. That obviously is the most precise statement of my views. I find that among the bills that have been submitted that I have had a chance to study, Senator Weicker's bill comes closest to my views and the testimony Senator Eagleton gave this morning comes very close.

Essentially, I would make two basic points. First of all, the distinction between investigative proceedings and adjudicative proceedings to me is critical. I do think, as Senator Eagleton has testified and Senator Weicker has proposed, that an unqualified privilege for investigative proceedings is necessary. Second, when you get to adjudicative procedures—and here I would also include some agency enforcement proceedings—when you get there I think some qualifications are appropriate.

The second point picks up on remarks you were making. I do think more attention should be paid to procedures. I have tried to tighten up the standards, but I do think when it comes time to mark up the bill that you should spend a great deal of your own time on procedures, such as exactly when appeals may be taken, on whom are the various burdens of proof, and things of that sort. I have tried to do that with this bill I have given to you.

Senator TUNNEY. I think it would be appropriate to have your bill or proposal included in the record at this point.

Mr. BLASI. It is only a working paper at this stage. The conference of Commissioners on Uniform State Laws will be publishing a first public draft for proposed hearings in Washington later this month. I gather the record won't be made public at this point.

Senator TUNNEY. Would you care to summarize at this time the provisions that you have contained in this draft?

Mr. BLASI. Surely.

First of all, I think that it is primarily a specialized segment of journalism, a profession that is affected in quantitative terms by the subpena threat and this is investigative reporters. Also the harm is not so much in getting a particular scoop, it is in the number of sources. What newsmen need is to be able to talk to the rank and file. So I would limit the privilege to those reporters who can state under oath that the information in question could be obtained only by reaching an understanding with the source that the contents of the information or identity of the source would not be disseminated to the public or that serious harm to an ongoing source relationship would result if the information were disclosed.

Then I would word the exceptions, which would only apply in adjudicative proceedings to require the party seeking evidence to prove by clear and convincing evidence, one, that it is highly probable that the professional disseminator of information, that is the term I would use rather than reporter, could give valuable evidence which is relevant to a significant issue in the proceeding, and, two, the party seeking evidence has expended a substantial amount of time in investigating all other sources of information relevant to the issue, and three, it is especially important that the professional disseminator of information give evidence because either (a) it is more likely than not that the professional disseminator of evidence can give evidence that is more important to the determination that all the other evidence available from other sources, or (b) the issue to which the evidence is relevant is so important and so closely contested that a just resolution of the adjudicative proceeding would be impossible unless the professional disseminator of information is required to give evidence. That is how I would word the standard at this stage.

There is one other point if I can mention it. There has been a good deal of talk about whether the privilege should apply to the states or not. I must say that my first reaction on this several months ago was probably that it should not, that there was some doubt about constitutional power. I remember I was talking to one reporter and he suggested how about the Commerce Clause as a source of power and I said I guess you can make anything come under the commerce power. I didn't think it was a very good basis for the Civil Rights Act of 1964. I don't like the idea of manipulating the Commerce Clause in that way.

I have had a series of discussions with a number of leading constitutional scholars around the country and it is funny how often the following reaction takes place. We say what about the Commerce Clause and we start to think about it and we realize that, No. 1, in terms of goods crossing state lines it is clear this is more of a Commerce Clause problem than many of the economic problems. When one person can't get a story in one state you and I are affected and there is a very strong Federal interest it seems to me in protecting the flow of information because decisionmaking at the Federal level depends upon the work of investigative reporters around the country.

I feel very strongly that the privilege should cover the states and would be upheld by the Supreme Court if it were challenged. It would put me out of business with the Uniform State Law Commission, but that is okay.

Senator TUNNEY. That is interesting.

Do you have any information which would indicate whether those states that have newsmen's privilege laws which are of an absolute nature have been hindered in the so-called search for the truth? Do we know of instances where newsmen have invoked the privilege in trials in State courts in such a manner as to hinder the judicial process?

Mr. BLASI. Certainly not in a quantitative sense. There are particular instances when a particular party in a dispute would like to subpena a reporter and under an absolute privilege cannot do so. But if you are talking about any overall hindrance, any quantitative fact, I think there is none. A number of prosecutors I interviewed on this problem said they thought on the whole the privilege helped them for a number of reasons. One was that before this became such a symbolic issue there was a great deal of cooperation among reporters and law enforcement authorities, a great deal of voluntary cooperation and as a result of all the subpenas that have been thrown around in the last couple of years that cooperation has fallen off dramatically, and the second is prosecutors as well as others get a great deal of their leads from good investigative reporters, particularly when you are talking about cracking the subcultures, which are very hard to infiltrate or learn about.

I think on the whole that you really cannot say that in any sense that law enforcement or other interests would be largely affected. In fact, if I were a district attorney I wouldn't spend a minute of my time fighting this kind of privilege bill. I think of individual situations with a particular person involved, that is why I don't think it ought to be absolute.

Senator TUNNEY. But your information is, in talking to district attorneys and prosecutors, that no States where they have an absolute privilege, that law enforcement has been advantaged or disadvantaged?

Mr. BLASI. I think that is right. I think the same advantage to law enforcement could come from qualified privilege. Again, if you pick up on the emphasis that you suggested, the real problem is the number of subpenas. If you can greatly reduce the number of subpenas to reporters and other disseminators of information, the problem would be alleviated. There would be very few in which there is evidence to be had that is critical. The number would be so small and the climate of anxiety and the fears of sources would be minimal, it seems to me.

Senator TUNNEY. What about libel, would you grant an exemption for libel?

Mr. BLASI. Libel is very troublesome. I would not grant a blanket exemption. I think the testimony Mr. Hume gave is persuasive. I do think that the combination of the *New York Times* privilege and a newsman's privilege to gather can be detrimental, I think. If indeed it is important to prove actual malice and you have no way at getting at the source, that is too much of a privilege. So the problem is trying to specify those libel cases where, No. 1, there is defamation and, No. 2, there is a substantial chance of proving there will be disregard shown. It is very hard to do that. It is very hard to establish whether it is true or false without getting at the source.

One suggestion made in the *Yale Law Journal* is that the inquiry should be broken down into two steps; first, did the article refer to the plaintiff and was it defamatory and damaging, and once you have established that then you can get to talking about the *New York Times* problem, and then at that point you may be able to divest the privilege.

I have drafted the current statute without breaking down the inquiry into two steps because it is very hard sometimes to know whether you want to go to trial on the issue as a lawyer if you have no idea of whether you will be able to discover the source eventually. But my own thinking has been changed a little bit by what Mr. Hume said, and I want to go back and redraft my provision as it applies to libel.

Senator TUNNEY. You can imagine the problem that those of us sitting up here have of trying to draft legislation when such an eminent authority as you says that perhaps his mind has been changed by testimony that he heard today.

Mr. BLASI. It has been a fascinating problem. I have been living with this for 3 years and I must say it has seemingly endless dimensions.

What I would like to do, if you would be interested—I have found that this committee which I am working with, an appointed committee from the uniform state law commissioners, is extremely good. I am generally cynical about committees. But this is one in which there really has been a tremendously valuable exchange of viewpoints and technical drafting suggestions.

I would like to send you our more recent drafts as they are made.

Senator TUNNEY. The subcommittee would be happy to receive them.

As I understand your answer with regard to libel, you tend to agree with the *Cervantes* decision and the rule of law announced in the *Cervantes* decision?

Mr. BLASI. Yes, I do. Again, I would like to ponder more into drafting, but I agree with the basic idea of Mr. Hume suggested that a blanket exemption would be terrible. Libel suits could be used to smoke out a source. The goal should be try to find those few cases where there really is a good chance that there was a defamation and there was reckless disregard. How to do that is very difficult. The general standard of my statute for all adjudicative situations would probably be one, but I think it could probably be improved.

[The prepared statement follows:]

PREPARED REMARKS OF VINCE BLASI, PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

First, let me thank you for inviting me to testify before you.

I have spent the past two years studying this problem and have written a lengthy report, of which I understand each of you has a copy, and numerous articles on the subject. Currently, I am the Reporter for the Uniform Law Commissioners' committee on a Uniform Evidentiary Privilege for Professional Disseminators of Information. In this capacity I have been deeply involved in drafting a shield law for use at the state level, the most recent draft of which I have included as an appendix to my remarks.

In my opinion, two principal value judgments should inform your deliberations. The first is that professional disseminators of information, like virtually all other citizens, should have to give evidence in those rare instances in which they possess information that is clearly indispensable to a fair adjudication of a specific dispute. The second is that when the value of a professional disseminator's evidence is marginal, speculative, or questionable, he should not be required to disclose the information if his doing so might render him less effective in providing information to the public.

In attempting to implement these value judgments, I recommend that you draft your statute with three critical distinctions in mind. First is the distinction between those professional disseminators of information who require a measure of immunity from subpoenas in order to function effectively and the vast majority of information disseminators who need no such protection. The second distinction is between adjudicative proceedings, which ordinarily call for specific evidence on particular points that are in dispute, and investigative proceedings, which typically range widely and employ informal procedures in quest of data of a more general nature. Third, there is the distinction between subpoenas that are sought as a last resort in compelling circumstances and those the are requested for exploratory or vindictive purposes or out of sheer laziness. My own judgment is that a qualified privilege which is fashioned around these three distinctions will, contrary to some public assertions, make a substantial contribution to the flow of information to the public and will still leave room for those few subpoenas which serve legitimate and overriding evidentiary needs.

With regard to the first distinction, I do not believe that you ought to single out "newsmen" for the benefit of your privilege. It is true that journalists will doubtless be the primary beneficiaries and that, on the whole, journalists have more to do with the flow of information to the public than do most scholars, pamphleteers, or touring lecturers. But the quality of the information that ultimately reaches you and me depends also on the work of these other disseminators, particularly since the facts they learn and the viewpoints they develop frequently are passed along to us via the press. Thus, from the standpoint of the flow of information to the public, which is the perspective from which this legislation must be viewed, it would be desirable to include all those disseminators of information whose capacity to function is impaired by the subpoena threat. The problem is that such a broad evidentiary privilege could easily swallow up the basic principle that investigative and adjudicative tribunals are ordinarily entitled to have the evidence of involuntary witnesses. If, however, the privilege were limited to those information disseminators who could justifiably claim to be professionals, this problem would be largely dissipated. Furthermore, under such a restriction, the benefits of the statute would be concentrated on those who, by and large, depend most on confidential relationships with sources and who can be said to contribute the most to public enlightenment. Accordingly, I suggest that you fashion your bill to cover "professional disseminators of information", defined as those who earn their principal livelihood by, or regularly spend at least twenty hours per week in the practice of, obtaining information for eventual dissemination to the general public by means of mass reproduction facilities.

Further pursuing the first distinction, I think you should restrict the privilege to those professional disseminators who can, in good conscience, state that they were able to obtain the information that is the subject of the subpena only by giving the source an explicit promise of confidentiality or that serious harm to an important, ongoing source relationship is likely to result if the information is disclosed. In setting out this requirement, you would be properly rejecting the argument put forth in some quarters of the press that the question of conflicting ethical obligations to sources and to society should be resolved by the journalism profession rather than the legal profession. Yours would not be a privilege giving substantial autonomy to a profession, analogous to the attorney-client, doctor-patient, and priest-penitent privileges. Likewise, it would not be a privilege recognizing "the obligations of honor among gentlemen", as the original common-law privileges were characterized. If an analogy is necessary, the privilege would most closely resemble that possessed by police informers. The privilege is justified only when it helps a governmental institution—in the one case the prosecutor, in the other the electorate—obtain the information it needs if it is to fulfill its responsibilities.

I also recommend that you not provide for litigation over whether a promise of confidentiality was necessary to get the information or whether harm to ongoing source relationships will result from disclosure of the information. These propositions would ordinarily be impossible to establish without the testimony of the very source whose identity or additional information is being sought. Because impact on the information flow is likely to be so speculative and so difficult of proof, I fear that any procedure calling for a judicial determination of such impact would produce an unacceptable variance in results. Instead, you ought to provide that the professional disseminator's estimate of impact on the information flow, made under oath with a detailed and specific, accompanying affidavit, is conclusive. Should the disseminator file an affidavit that is insufficiently detailed he could be forced to rewrite it, with the sanction of a contempt citation should he persist in his evasiveness. If he were to file an untruthful affidavit, he could of course be convicted of perjury.

Having limited the privilege to those situations in which the information flow is threatened, you should restrict the exceptions to the privilege to those instances in which there is a substantial evidentiary gain to be had by requiring the disclosure of the information. Accordingly, I suggest that the privilege be superseded only in an adjudicative proceeding under certain carefully defined conditions. Central to this decision is the second key distinction—that between investigative proceedings and adjudicative proceedings.

Too often discussions of the subpena power in general, and of press subpenas in particular, lump together the evidentiary interests that are served without distinguishing the various kinds of proceedings for which compulsory process is authorized. This is a great mistake. For there can be no question but that subpoenas are infinitely more important to adjudicative processes than they are to investigative processes.

Seldom will an investigation be so narrowly focused that the information possessed by a single, involuntary witness will alter the outcome. Typically, investigative proceedings are exploratory in nature—they seek to discover leads or to gain perspective. Co-operative witnesses can be most helpful toward these ends, but witnesses who appear only under compulsion will hardly ever contribute information of real value. There simply is no way to compel someone to be expansive or suggestive. Furthermore, even if the subpoena power were as valuable to the investigative process as it is to the adjudicative, it is difficult to maintain that investigations play as important a role in our society as do adjudications. When there is a concrete dispute between contending parties, identifiable persons are affected by the decisions that are reached. Sometimes investigations do indeed change the course of public policy, but more often they merely confirm pre-existing outlooks or generate recommendations that are not implemented. And not only are investigative subpoenas of dubious evidentiary importance in an overall sense, but also it is virtually impossible to determine intelligently when a particular situation presents an exception to this generalization. The typical investigative proceeding is characterized by informal procedures, a casual or non-existent delineation of the issue under inquiry, the loosest possible standards of relevance and probative weight, and a step-by-step scenario—all of which makes sense in terms of investigative efficacy but makes it extremely difficult to estimate the likely evidentiary value of a subpoena which may entail a significant cost in terms of other societal values.

When one examines the other side of the ledger, it seems clear that on the whole investigative subpoenas do significantly more damage to the information flow than adjudicative subpoenas. The sources of professional disseminators dry up for a myriad of reasons, but a major cause is due to resentment of the disseminator for his complicity in what is perceived as a partisan, vindictive proceeding. In theory, and for the most part in practice, the process of adjudication is objective and apolitical in nature. Investigations too often are not, and herein lies the cause of much source disenchantment and withdrawal. In addition, it should be noted that the damage to the information flow is in part a function of the number of subpoenas that issue over a period of time because this affects how individual sources perceive the subpoena threat. If the power to compel evidence from professional disseminators were limited to adjudicative proceedings that have reached the formal stage, the quantitative incidence of subpoenas would be greatly reduced and the perception of the threat by sources would diminish considerably in consequence. There is much to be said, therefore, for a privilege which treats investigative subpoenas issued against professional disseminators of information as a separate dimension of the problem, the analysis of which need not be complicated by a consideration of the very real evidentiary values that subpoenas serve in the adjudicative context.

I conclude that an unqualified privilege against investigative subpoenas is in order for those professional disseminators who can swear in good conscience that harm to the information flow is likely to result if they are made to give evidence. The evidentiary gains to be had by investigative subpoenas against professional disseminators in these circumstances are minuscule, particularly when one takes into account the depth of conviction on the issue which leads many disseminators to accept jail sentences rather than give their evidence. In my judgment any attempt to delineate a narrow set of exceptions to the privilege is not only unnecessary from an evidentiary point of view but also would constitute an irresistable invitation to abuse, given the unstructed procedures of most investigative tribunals and the partisan zeal that so frequently permeates their proceedings.

Grand jury proceedings present a special case. They fall somewhere between purely investigative proceedings and those that are essentially adjudicative in nature. Particularly when the prosecutor has proposed that a named individual be indicted, the grand jury proceeding has many of the attributes of an adjudicative hearing. I am of the opinion, nonetheless, that all grand jury proceedings should be classified as non-adjudicative such that professional disseminators are privileged against having to give evidence if their capacity to provide information to the public would thereby be harmed. I have reached this conclusion for a number of reasons. First, grand jury proceedings are so informal that a qualified privilege geared to notions of probable cause, relevance, exhaustion of alternatives, and the relative importance of the evidence would be very difficult, if not impossible, to administer in that setting. The secrecy of grand jury proceedings, perfectly justifiable in many respects, only exacerbates this problem. Also, it should be noted that the quantum of evidence necessary to secure the return of an indictment is quite minimal. A professional disseminator's evidence is likely to spell the difference between the return of an indictment or its dismissal only when he was the sole eyewitness to criminal behavior. Ordinarily, he will be in this position only by giving his sources a promise of confidentiality backed by a pledge to go to jail if necessary. In these circumstances, there is no evidentiary gain to be had by subpoenaing the professional disseminator and, if reporting of criminal behavior is deterred in the future because of the threat of jail, much important information to be lost. Particularly since the issue of how best to deal with vice-squad crimes such as drug use, prostitution, gambling, and homosexuality is of such vital contemporary concern, this possible disruption of the information flow should weigh heavily in the balance. I thus believe, despite a general predilection against absolute legal standards, that an unqualified privilege against grand jury subpoenas is appropriate.

When one turns to the problem of adjudicative subpoenas, it is far more difficult to give statutory expression to the distinction between subpoenas that serve substantial evidentiary ends and those that do not. Two important questions to address at the outset are whether a distinction should be made between civil adjudications and criminal adjudications, and whether the statutory standard should be of the mechanistic, *per se* variety so as to achieve the maximum in predictability at a possible cost in lack of flexibility.

Concerning the first question, I do not believe it is advisable to distinguish between civil and criminal proceedings. Admittedly, forceful arguments can be made to the effect that criminal trials are more important from a societal point of view than civil trials, and that criminal prosecutions depend more on the kind of evidence that professional disseminators tend to acquire. It would be a mistake, however, to belittle the importance of civil litigation in general, or to dismiss out of hand the value of the evidence that professional disseminators can sometimes contribute to civil trials. This is especially true with regard to actions for defamation. A plaintiff who is required under the Supreme Court's decision in *Metromedia v. Rosenbloom* to prove that the defendant acted in reckless disregard of the truth will almost never be able to meet such a demanding burden if he cannot discover the identity of the defendant's sources for the story. Civil actions by demonstrators against law enforcement officials for violation of their civil rights form another class of disputes regarding which professional disseminators may possess important eyewitness evidence that ought to be compellable under carefully limited circumstances. One should also take into account the desirability of having a uniform standard to govern all adjudicative proceedings so as to forestall a party from bringing one kind of proceeding in order to get evidence or leads for use in a different type of proceeding. On balance,

the desirability of having a uniform standard to govern all adjudicative proceedings so as to forestall a party from bringing one kind of proceeding in order to get evidence or leads for use in a different type of proceeding. On balance,

therefore, I urge you not to design separate standards for the two broad categories of adjudicative proceedings.

As for the type of standard that is most appropriate, I think you should place a premium on flexibility and the capacity to respond to the nuances of the particular fact situation. Consequently, I recommend a comparatively *ad hoc* rather than *per se* set of exceptions to the privilege. If the essential function of a statutory privilege were to provide an explicit guaranty of confidentiality at the moment of source-disseminator contact, then a highly predictable *per se* privilege would be desirable so that sources and disseminators could know at that point exactly what information was protected and what information was subject to subpoena. But that is not how things work. No reporter can get sensitive information from a source merely by brandishing a privilege. First a relationship of trust must be established because the reporter can always break a promise of confidentiality and turn over the information voluntarily. And once a genuine mutual trust *is* established, the exact wording of the privilege is seldom a topic of discussion and doesn't really matter for the reporter will almost always promise to accept incarceration rather than breach the trust. What makes reporters willing to make such pledges, and sources willing to believe them, is not the wording of a *per se* privilege but the belief that things will never come to that end. That calculation, in turn, depends most of all on how many reporters are actually being forced to testify against their sources and in what circumstances such testimony is being compelled. In other words, the precise wording of the privilege is not what really counts; rather, the key consideration is the way disseminators and sources perceive the subpoena threat. If one begins, as I do, from the proposition that disseminators should be required to disclose their information in those rare instances when their testmony is really likely to change the outcome of a case, then it is clear that a flexible standard can do a better job of reducing the number of subpoenas that are ultimately issued than can a *per se* rule, which must necessarily cut a broader swath of exceptions.

One other consideration deserves mention. Apart from lack of predictability, the chief drawback of a flexible standard is that decisions concerning its application may be influenced to an unhealthy degree by sympathies and biases peculiar to the individual decision-maker. I suggest a standard that minimizes this possibility by requiring a very detailed specification of need by the subpoenaing party and by insisting on a clear-and-convincing burden of proof with regard to this need. In addition, I recommend that you minimize the cost to the information flow of such individualized administration of the standard by providing for a suspension of contempt sanctions against the disseminator until all appeals regarding the privilege claim have been exhausted.

If protective procedures of this sort are instituted, I feel confident that a tightly drawn qualified privilege can do the job. I suppose that adjudicative proceedings be governed by a refinement of the qualified privilege that Justice Stewart advocated in his dissent in the *Branzburg* case. In order to overcome the basic privilege, a subpoenaing party should have to establish by clear and convincing evidence three essential propositions. First, he must show that it is more likely than not that the professional disseminator has information which is clearly relevant to a significant issue in the dispute. Second, the subpoenaing party must demonstrate that he has diligently attempted to obtain the information by alternative means that are less injurious to the flow of information to the public. Third, he must prove that whatever information is obtainable from alternative sources is clearly inadequate. Under this proposal, none of these propositions could be established by mere pleading. Rather, the subpoenaing partly would have to submit a detailed affidavit specifying in abundant detail exactly why each is true.

From what I have seen of press-subpoena disputes, no subpoenaing party will be able to satisfy the specification requirement or be willing to endure the statute's procedural demands unless there is a high probability that truly pivotal evidence is at stake. This will so seldom be the case that the number of subpoenas that would ultimately issue under such a qualified privilege would be very low indeed. If so, the subpoena threat would no longer be an important determinant of source behavior. In short, I think that a statute drafted along the lines I have outlined can come close to recreating the situation that existed a few short years ago before parties began subpoenaing reporters so indiscriminately.

Senator **Tunney**. Well, thank you very much. We appreciate your coming and giving us the benefit of your wisdom.

The committee will recess until 10 o'clock tomorrow morning.

[Whereupon, at 12:30 p.m. the committee was adjourned until Thursday, February 22, 1973, at 10 a.m.]

NEWSMEN'S PRIVILEGE HEARINGS

THURSDAY, FEBRUARY 22, 1973

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 318, The Russell Senate Office Building, Senator Sam J. Ervin, Jr., (chairman) presiding.

Present: Senators Ervin (presiding) and Gurney.

Also present: Lawrence M. Baskir, chief counsel and staff director; and Britt Snider, counsel.

Senator ERVIN. The subcommittee will come to order.

Senator Weicker, you are the first witness and I want to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your study on this subject. I know you have given a great deal of time and consideration to the subject to prepare the bill which in my judgment has much merit.

We are glad to have you here today.

STATEMENT OF HON. LOWELL P. WEICKER, JR., U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator WEICKER. Thank you very much, Mr. Chairman. In my testimony this morning I would like to do more than simply reiterate or republicize the drama of newsmen struggling to protect their new sources from the Government. Quite simply, the rhetoric already abounds.

I'm more than willing to leave it to others—who have testified or who will testify—to dramatize the impact of this struggle.

Instead, I'd like to serve this committee in its legislative task, by setting forth information testimony on the specific legislative problems you face.

The complicated responsibility you are undertaking, will, in the end, yield only to thoughtful, well-informed consideration of fundamental legal questions. I feel a direct responsibility, therefore, to assist in that most serious and difficult task.

Judging from numerous deliberations that I've experienced and witnessed in recent months, four basic questions must be intelligently handled, if the Congress is to produce sound and wise legislation. My testimony will focus on these four questions:

First, do we need legislation at all—or alternatively, could a legislative solution be counterproductive?

Second, is the public's right to news "absolute" or should it be balanced with other fundamental needs and rights of society?

Third, what is the extent of Federal legislative authority; or put another way, should Congress preempt State legislative authority in this matter?

And fourth, should Congress enact carefully drawn and unambiguous standards, as opposed to broad and sweeping legislative provisions?

In addressing the first question—whether we need legislation at all—it is important to set out a framework for viewing the whole issue of Government intrusion on news sources.

To begin with, the recently publicized plight of newsmen isn't our first experience with dramatic jailings of newsmen. Even the young Benjamin Franklin, while serving as an apprentice, was brought before a Government body and questioned about a news source. In that very case, Franklin's editor was imprisoned for a month when he refused to reveal his news source.

If threats to hold newsmen in contempt are not new, it cannot be said with equal fervor that the overall effect of recent attacks on newsgathering is old hat.

On the contrary, the dramatic increase in scope and intent of subpenas and other events over the past 4 years has generated consternation and apprehension throughout this Nation.

Simply stated, then, the problem is this: Widespread activities, such as subpenas, speeches by Government officials, or "guidelines" from the Justice Department—all of which may have little empirical significance in and of themselves—have undoubtedly combined to create a highly visible and distinct awareness that news sources had better be careful—or better yet, be quiet!

If we put the problem in proper perspective, it's really a question of a rather frightening "message" that's been telegraphed throughout our society. We must now restore the proper sense of confidence to those who are potential sources of our news.

Reason and responsibility will fight the fear we are dealing with. Extremes are not needed.

My analysis, to this point, indicates only the nature of the problem we face. To answer whether a legislative solution is appropriate, we must look at other facts.

Judging from the nature of the problem, it would have seemed far preferable for the Supreme Court to have dealt with it when they faced the issue last June. Unfortunately—and in contrast to popular myths—there was no binding legal basis for the Court to act upon. The first amendment does not address itself to the right of newsmen to protect sources. It says simply "Congress shall make no law . . . abridging the freedom of speech or of the press." It is a prohibitory statement, and asserts no positive obligation on judicial creativity—except perhaps when interpreting a specific legislative enactment. At best, there is a "spirit" or "intent" in that amendment that the Court could have used as a springboard for innovative judicial leadership. The Court did not take that path, and their decision is clear on its face.

Nor can we look elsewhere in the statutes for some codification that pertains to rights of a news source or newsman to some confidential relationship.

In essence, then, there is no affirmative law to protect what we all talk about as a "free press."

We might have hoped for some action from the executive branch. And although we did see the Justice Department issue a set of "Guidelines for the Attorney General on Press Subpoenas" in 1970, this is not an appropriate or adequate solution. To begin with, it is the wrong message—because it spells out "how to" get at news sources, not "how not to" abridge a free flow of news. Even more important, administrative regulations have a fundamental flaw. They depend on the whims and winds of administrative fancy—they can be rescinded in an instant, without debate or public participation.

So the answer to my first question is that legislation is needed. It is needed because there is a specific problem to be dealt with. It is needed because, contrary to popular myth, there is no other legally enforceable basis for protecting the public's right to news. It is needed because there are those who would cheapen the "spirit" and "intent" of a free press.

Now, let me add one word of caution. Although legislation may be needed, this does not mean just any piece of legislation. Harsh or extreme measures that leave us with unwanted side effects, or widely disruptive statutory precedents, would be ill-advised.

Legislation springing from hysteria is not needed. Legislation to deal with the practical aspects of the problem is needed—it is all that is needed. There is an old adage in the law that "hard facts make bad law." Let us not allow hard facts in this case to sway us into bad law that in the end will be an unconstitutional law—and therefore no law at all!

The second issue I would like to comment on this morning is whether the public's right to news is "absolute," or whether it should be balanced with other fundamental needs and rights of society.

I'd like to mention at this point, Mr. Chairman, a statement I have heard over the last few weeks and days. The statement was made that an absolute and preemptive bill is a political impossibility. May I point out that an absolute bill is a constitutionally impossible bill. That is the point. Not that it is a political impossibility.

We have a first amendment to the Constitution, but we also have a sixth amendment. Unless you are willing to dispose of the sixth amendment, then believe me, an absolute bill is a constitutional impossbility, and I think that ought to be said clearly at this point in time.

Senator **Ervin**. If I may interrupt at this point the columnist, Mr. Kilpatrick, made a statement the other day to the same effect.

Senator **Weicker**. Thank you.

Now, this is at best a complicated question, and I will try to reason it through by approaching the issues step by step.

First, I feel it is important to understand what type of legal concept we are attempting to employ. One technique that is often put forward is that we are embarking on something akin to evidentiary privileges, such as those granted to a husband and wife.

Not surprisingly, those court cases which have considered the relationship of a newsman's privilege to a common law privilege (such as *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (1957)), have concluded that policy reasons for the newsman's evidentiary privilege are lacking. To illustrate this, we must look at the four basic criteria cited by Professor Wigmore, the leading scholar in the law of evidence as necessary to establish a common law privilege.

First, the communications must originate in a "confidence" that they will not be disclosed. What this means is that when a wife talks privately to her husband she does not expect any part of that conversation to be repeated anywhere, at any time. On the other hand, when a news source tells something to a newsman, his whole purpose is to see that the story be told—in public.

Wigmore's second criteria requires that confidentiality be an essential part of a "relationship" between the parties. To the best of my knowledge, there are few ongoing "relationships" between newsmen and their sources, at least not the type of relationships that are held together—like a marriage or religious alliance—by private talks and interchanges which stimulate, benefit, or foster an interdependence between each other.

Wigmore's third criteria—that the community have an interest in fostering this relationship—is again off the mark. The community has no interest in the personal, private relationship between newsmen and their sources, but only in the information which is disclosed from their dealings.

Finally, Wigmore's fourth criteria—that injury from disclosing the content of the communications must be greater than the benefit gained by the correct outcome of litigation—is not necessarily met by the news relationship. There is often no injury from disclosure of the content of communications—after all, that is the whole point of the relationship.

An additional point that must be made with respect to privileges is that, as opposed to all existing concepts of evidentiary privilege, the newsman would be the person asserting the privilege. In contrast, for example, a lawyer-client privilege belongs to the client, and the client may waive it regardless of his lawyer's wishes. Furthermore, for the first time we would be asked to contemplate a privileged communication in which someone invoking the privilege could pick and choose as to what parts of the relationship or communication they would reveal.

Finally, the other professional relationships protected by common law privileges are fundamentally different from the relationships newsmen would protect. Those professionals to whom a common law privilege is now extended provide a real and needed service to the persons who seek their aid.

It is clear that an evidentiary privilege isn't appropriate.

Where, then, does this lead us?

Perhaps the best analogy to what we are dealing with is the "informer's privilege"—a relationship which permits law-enforcement officers to refuse to disclose an informer's identity. Resemblance between the two situations lies in the underlying legal justification that, in its absence, valuable information would be lost.

Now we come to the crucial point. When a witness who refuses to answer a question on the first amendment grounds is confronted with the accused's sixth amendment right to compel testimony, it has been held—in the landmark case of *Roviaro* v. *U.S.*, 353 U.S. 53 (1957), that sixth amendment rights are of sufficient importance to override the Government's interest in maintaining the confidentiality of its informant relationships. The Court, in another landmark case, *Barenblatt* v. *U.S.*, 360 U.S. 109 (1959)), stated that "when an abridgement of the first amendment flows from an otherwise lawful Government action, the resolution involves a balancing of the particular interests."

Mr. Chairman, because we have certainly heard a great deal about the first amendment, but I think it is important to read the sixth amendment:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * *

This a also a right we all have. How frightening to live in a nation which does not have a free press, but how frightening to live in a nation where we cannot face our accusers. And that is why I said this is a job that is going to require tremendous legislative skill, not demagogery. Demagogery is the one thing that can rip apart the one thing we all have that is valuable—that is the Constitution of the United States, and that stands ahead of everything.

I would suggest, this morning, that the Congress follow this well-considered path already staked out by the Court.

We've established that we're not dealing with absolute rights to a strict evidentiary privilege.

We're not even concerned with any person's privileged status—but rather with the public's right to know. At best, we have a legal analogy to the protection granted informers. The Court, as well as numerous legal scholars, have seen fit to "balance" our own Government's first amendment "interests" in the confideniality of informers. I would encourage a continuation of this concept of balancing in our present legislative task.

This, however, leads us to the issue of whether balancing is either proper or wise.

We need not search far—no farther than the citation of 21 separate landmark cases in the recent *Branzburg* opinion, also referred to as the *Caldwell* case—for authority that—and I quote—

> Laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

Again I quote:

> It is clear that the first amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.

Beyond these specific statements, there is ample authority for balancing first amendment rights.

The press, just as every one of us in this room and every citizen in this country, is helped by the sixth amendment of the Constitution of the United States.

I submit, therefore, that rights specifically granted under the sixth amendment—rights to every man's testimony—can, with all due propriety, be balanced with rights that are at best "derived" from the "spirit" of the first amendment.

Would this be a wise course of action?

You will recall that when I earlier outlined the problem we are facing, I took pains to point out that the real problem is not found in the extreme cases, such as dramatic jailings, which have been with us for centuries. The problem is found instead in the scope and depth of public fears—which has a primary impact on drying up sources of news.

There is no need then to jump to legislative extremes—we can cover the scope of normal experiences by assuring a balance in favor of news sources in those cases. Only when we reach the unusual and compelling case—the murder, the rape, and so forth—would the balance shift.

It is a sensible form of protection. It does the job. It sends a clear message because it does not sacrifice predictability, so long as careful standards are employed, and it does not set unwieldy, unnecessary, or haunting precedents.

THE EXTENT OF FEDERAL LEGISLATIVE AUTHORITY

The third basic issue this committee must resolve is whether Congress should preempt State legislative authority.

One theory that is often put forth in favor of preemption is that first amendment rights are among the rights that are protected under the words of the 14th amendment—which mandated "equal protection of the laws." As we all know, in recent years the 14th amendment, including all rights incorporated into it, has been interpreted as applying to the States.

This is all true; the States cannot undertake an activity today which violates the first amendment, because it will be declared unconstitutional by means of the 14th amendment.

But there is one important flaw. The first amendment only prohibits Congress from "making" a law which violates a free press. Similarly, under recent interpretation a State cannot make such a law. There is absolutely no language whatsoever in the first amendment that confers upon the Congress an affirmative legislative authority or power. In fact, it says the opposite. Nor is there any precedent for Congress using legislative powers springing from that amendment for enacting legislation.

The clauses of the Constitution that grant legislative powers have been well-established—and this is not one of them. If no positive legislative powers are granted Congress under this amendment, then there are no such powers to be incorporated into the 14th amendment and thereby applied to the States. This route is closed.

Alternatively, it is said that the Commerce Clause gives Congress the power to preempt States in regulating a newsman's testimony. This possibility requires us to take note of a very important point. What the Congress is considering today is, in fact, a set of rules as to who shall, and who shall not, testify before courts, agencies, commissions, and legislative bodies. These are procedural rules, no matter how we try to dress them up.

Now, we all know that rulemaking powers, the very powers that we have used to promulgate the Federal Rules of Evidence, the Federal Rules of Civil Procedures, the Federal Rules of Criminal Procedure, and the Administrative Procedure Act have all flowed from the "necessary and proper clause" of the Constitution. Congress has the power to enact whatever laws may be "necessary and proper" for the functioning of its own body and the specific bodies it has the power to establish—such as the Federal Court System and the Federal agencies, departments, and commissions.

None of these sets of rules was ever enacted under powers found in the Commerce Clause. Not only would that be an absurdity, but it would be a complete irrationality, and nullification of an immense body of law and experience. Faced with complete sets of State rules for every State in this Nation, we are now asked to contemplate Federal preemption hanging over each and every one of them.

Imagine the chaos which would spring from the resultant uncertainty as to when and where the Congress would strike next. There is in fact no substantive distinction which could recommend against our imposing all Federal Procedural Acts. On the States, since these acts often promulgate equally fundamental rights as those we are considering today.

All this under the guise of regulating commerce?

We have no business in the State courts or other State bodies.

If they indulge in unconstitutional procedures, the courts are there to strike them down. But so long as they enact constitutional procedures, we cannot impose our separate choice of procedures. We cannot even do it under the "necessary and proper" clause, because that authority extends only so far as the Federal bodies Congress creates or controls.

Once again, I cannot recommend the extremes of disruption and irrationality. I suggest for your consideration a Federal law for Federal bodies.

THE NEED FOR CAREFULLY DELINEATED AND UNAMBIGUOUS DEFINITIONS, STANDARDS, AND PROCEDURES

The final issue I will address this morning is the need for careful and unambiguous legislative provisions. This question actually goes to the "format" of the legislative product—specifically, the use of comprehensive and carefully delineated definitions, standards and procedures.

I would begin with an observation from the recent *Branzburg* decision. The majority in that case pointed up the difficulty in setting up a rule, for protecting news, that would lend itself to "uniform enforcement." It was noted, in addition, that such uniform enforcement is absolutely essential to a meaningful resolution of existing difficulties.

I concur in these observations. If the legislation we turn out is to mean anything, it must not be subject to the vagaries of ad hoc interpretations. Let us not be naive and say that this is cured by sweeping, "absolute" sets of provisions. We must still answer who and what are protected, and "when" and "how" they invoke protection. Use of sweeping words, like "any person", is no solution. Almost every person in my Senate office processes information for dissemination to the public through a news medium. How, without specificity, does a court determine whether these persons can invoke a news shield bill to refuse testimony?

This is not even considering that failure to draft comprehensive and well-delineated provisions may send our legislative product to the junk heap of "unconstitutionally vague" legislation. We must not only avoid a law that is incapable of uniform enforcement, we must also avoid a law that is incapable of enforcement at all—for vagueness.

The favorite obstacle to resolving such difficulties is the cry that this type of legislation cannot accommodate confining definitions. This argument—that, for example, we cannot legislate a definition unless it covers every pamphleteer—demonstrates a basic misunderstanding of what the Congress is doing.

As I have explained earlier, we are not enacting a law pursuant to some first amendment grant of legislative authority. Rather, we are implementing the spirit of the first amendment by means of powers granted under the nesessary and proper clause. These rulemaking powers do not in and of themselves restrict us—at least in the sense that courts are restricted in their very different role of having to interpret the first amendment, which they of course interpret as applying to everyone.

The only way that the mandates of the first amendment could come into play would be if and when the court reviews the law we may pass. We may irrefutably enact rules applying to anyone we please, so long as this is not unconstitutional.

Would our action here be unconstitutional? The answer is clearly—no!

We will not violate the first amendment by passing a set of procedural rules which enlarge newsmen's existing rights. Rather than passing a law abridging a free press, which would be unconstitutional, we are expanding the existing legal protections with respect to the flow of news.

Finally, there are practical aspects of the legislative format to be considered. We will have provided the newsmen with nothing if we fail to provide "predictability." It is essential to be able to tell with certainty whether a specific "newsman" is able to assure confidentiality, whether he has a bona fide "source", or whether specific activity is covered by a shield law. Sweeping terms will have to "wait" for court interpretation.

On the other side of this issue, the public wants equal assurances that their right to their neighbor's testimony is not disturbed by a sham. They want, and have a right to, assurances of legitimacy—specific statutory assurances. Indeed this is nothing short of the stake we all have in maximum confidence as to the integrity of our judicial processes.

The format presented in S. 318, the News Media Source Protection Act, assures against these abuses and pitfalls. The committee may wish to examine the specific internal content of this format, and reshape it accordingly. But I strongly endorse the concept as a path of good judgment, and responsibile government—and I gratefully acknowledge the same endorsement by 12 of our distinguished colleagues in the U.S. Senate.

In conclusion, what faces the Nation today are issues as to our individual rights, as they are embodied both in the first and sixth amendments.

Several years ago, we all read in the newspapers of an incident where persons looking out of their windows actually saw someone being knifed in the street below, and they pulled their windows down and they drew the blinds.

I suggest to the subcommittee this morning that in many ways this Nation has preferred to pull the window down and close the blind, and that we are in real trouble if that situation is allowed to exist.

As long as we have a free press and one that brings to us the facts and sounds of what is going on around us, we will always be able to make the proper decisions. That is why the first amendment is so important. But it is also true, that if in fact there have been excesses in harassing the press of this country, then certainly I do not want to see the press use excesses to harass the other rights we are granted under the Contitution.

The easy course for me, for the Government, for the press, and for you, Mr. Chairman, and your committee, is to demagogue this issue. On the other hand, if we are to leave to this Nation a legacy that is worthy of what is written in our Constitution, then I suggest we throw the demagoguery away and get to the business of having an informed nation, a sensitive nation, a nation sensitive to the needs and rights of us all.

Thank you very much.

Senator **Ervin**. I want to say I share in full measure your views that constitutionally speaking there can be no absolute privilege. The Constitution, it seems to me, must be interpreted as a harmonious document containing provisions of equal importance and dignity and must be interpreted so as to give the maximum effect to each provision without nullifying the other provisions.

I think Justice Learned Hand had this in mind when he closed his Oliver Wendell Holmes lectures to the Harvard Law School in a declaration—substantially he said he ordered his audience to take up weapons against the absolutes and give them no thought in the effort to serve the first amendment. We ought not to nullify the provisions of the sixth amendment as you so well point out.

I wish to say that you have given a very substantial contribution by your testimony to the work of the subcommittee. Your statement evidences the profound consideration and understanding of the philosophical and pragmatic and constitutional implications involved in this question.

Senator **Weicker**. Thank you, Mr. Chairman.

Senator **Gurney**. Thank you, Mr. Chairman.

No questions, but I want to commend Senator Weicker, too, on a very comprehensive statement on a difficult subject. This subcommittee needs all the help it can get to come to grips with this question and you have helped us a lot.

Senator **Weicker**. Thank you very much.

Senator **Ervin**. Thank you very much.

Counsel will call the next witness.

Mr. **Baskir**. The Honorable Nelson A. Rockefeller, Governor of New York.

Senator **Ervin**. Governor, I wish to welcome you to the subcommittee and express our deep appreciation for your willingness to appear before us and give us the benefit of your views on this matter of crucial importance.

STATEMENT OF NELSON A. ROCKEFELLER, GOVERNOR OF THE STATE OF NEW YORK

Governor **Rockefeller**. Senator Ervin, I would like to express my deep appreciation. It is an honor to appear before your committee. All of us hold you in great respect as one of the outstanding protectors of the Constitution in our country. I would also like to congratulate the members of the committee for your undertaking.

We have just heard a brilliant analysis of this subject. I come before you as a simple local administrator who has had some practical experience in administering a law which has the same objectives as those for which these hearings are being held. I have been an elected official now for 15 years and have more than a passing acquaintance with fearless, hard-hitting journalism. As a matter of fact, I have a good many scars to prove it.

Senator ERVIN. I believe it was Elbert Hubbard that said when the Lord examines us on the last day, it is not to see whether we have any medals but to see whether we have any scars.

Governor ROCKEFELLER. Well, I won't show you my scars, but I've got them.

But, as I said at the Torch of Liberty ceremony for Steve Rogers, the Syracuse publisher, I would far prefer a society where a free press occasionally upsets a public official to a society where public officials could ever upset freedom of the press.

At the same time, the news media have a clear responsibility to be accurate, to be fair, to provide balance to all viewpoints. And especially in this electronic age, when television can practically create news, the media have the responsibility to maintain an honest perspective—to report molehills as molehills, and not as Mount Everest.

Before getting into the specifics of the legislative issue before you today, I'd like to express the philosophical basis of my views.

We begin with the fact that freedom of the press is a fundamental principle on which this Nation was founded.

We then have to proceed from that principle to the specific actions required to assure continued freedom of the press. And newsmen cannot operate in freedom unless they can guarantee their news sources confidentiality.

I am convinced that if reporters should ever lose the right to protect the confidentiality of their sources, then fearless, objective reporting, especially investigative reporting, will simply dry up.

The brand of resourceful, probing journalism that first exposed most of the serious scandals, corruption, and injustices in our Nation's history would simply disappear.

Since we believe in a free press—since the protection of news sources is indispensable to the maintenance of a free press—then the next obligation of a free society is to insure that newsmen can assure their sources of confidentiality.

This is exactly what we did in New York in 1970, when I signed the State's Freedom of Information bill.

This so-called shield law protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information and sources of information obtained in the course of gathering news for publication.

Our New York law is one of the strongest of the 19 State shield laws in the country in the protection it affords newsmen.

In fact, our law is one of only two State laws that protect both the journalist's confidential sources and the information obtained.

I have been asked to comment on the experience we have had with our State shield law in the 2 years since it has been in effect.

I am pleased to report that our New York State shield law is working well indeed.

This is true, in good measure, because our law enforcement people respect the philosophy behind a shield law.

This attitude is well expressed by Robert Fischer, New York State's Special Prosecutor of organized crime.

Mr. Fischer states that he and other prosecutors depend heavily on the published revelations of newsmen for leads into organized crime, official corruption, narcotics traffic, and similar criminal action.

This particular prosecutor once obtained 22 convictions in a drive against organized crime that grew initially out of newspaper revelations.

The papers that initially broke the stories won a Pulitzer Prize. And the prosecutor got his convictions without any attempt to force the newspapers to disclose the sources of their exposes.

The president of our State District Attorney's Association, Mr. John O'Hara, reports general satisfaction with our shield law among his fellow district attorneys.

In brief, our law enforcement people are not expecting newsmen to do their work for them by trying to force the disclosure of confidential news sources beyond what they publish.

Indeed, the small number of shield law cases that have come up so far testifies to the fact that police and prosecutors respect it and do not try to outflank it to get information that is privileged under our shield law.

I'd now like to discuss our experience with New York State's shield law in terms of four basic issues that shield laws raise.

1. Who is covered? Is it only those professionals engaged in gathering news, and not authors, or would-be authors, and others?
2. What is covered? Is it both the source and the information, or just the confidentiality of the source?
3. How is the information received? Is it in a context in which confidentiality has to be either expressed or implied?
4. Should we have State and Federal laws, or Federal preemption of this area? In my opinion, both State and Federal laws are sound but not Federal preemption.

Let us look at New York's experience under its shield law to the extent that our law illuminates these points.

WHO IS COVERED?

New York's law is clearly designed to protect the professional journalist or newscaster in the course of his or her work. Here is a case in point.

Mr. Alfred Balk, the editor of the *Columbia Journalism Review* at Columbia University, wrote an article several years ago on blockbusting in Chicago. In it, he relied on an unidentified source for key information. Last year, plaintiffs in a civil suit tried to compel Mr. Balk to reveal his confidential sources in a deposition taken in New York City. He refused. In support of his refusal, the court cited an Illinois shield law and quoted directly from my memorandum approving New York State's shield law.

What is covered?

New York's law, as I said earlier, protects both the confidentiality of the information, as well as the source.

Here is a case in point. In the so-called *Tommy the Traveller* case, a group of students at Hobart College were being tried on drug charges growing out of student protest on the campus.

The defense wanted to prove that "Tommy the Traveller" was an undercover agent and an investigator of student unrest.

The defense tried to subpena material from CBS, including film that had not been used—so-called "out takes." The network refused.

The court upheld the broadcaster's refusal, in part, on the grounds that the New York State shield law gave privileged status to this information.

In two other cases, the information did not have privileged status according to the courts.

After the 1970 riots in the Tombs prison in New York City, an inmate wrote an unsigned account of the event and submitted it to the *Village Voice* newspaper, which then printed his story using his name.

Thereafter, the district attorney's office subpenaed the actual manuscript as evidence it wanted in connection with cases arising out of the Tombs riots.

The paper refused, using the State shield law in part as a defense. The court held in this case that since the material and its author had already been made public, the shield law did not apply.

In another case, involving the same prison riot, some prisoners phoned a radio talk show from the Tombs prison.

The district attorney's office wanted tapes of these calls to use in prosecuting cases growing out of the riots.

The station, standing on the State's shield law, refused. The courts held that this was not an appropriate application of the shield law because the information was not confidential since it had already been broadcast to the public.

In a similar case, the offices of the State department of correctional services in Albany were bombed in 1971.

The same evening, a New York City radio station received a call from someone claiming to represent an organization called the Weather Underground.

The caller gave a location where the station could find a letter in which the Weather Underground claimed responsibility for bombing the State office.

The text of the letter was read over the air and released to the news services. But when the Albany County district attorney subpenaed the station for the letter, the station refused, saying that under the State's shield law they did not have to give up the letter.

The lower court ruled that there was no case of confidentiality involved in this information and ruled against the station. This case is now on appeal.

I cite these cases to show the practicality of the law in the way it operates.

It seems to me it is very fair and gives necessary protection without being arbitrary.

How is the information received?

A vitally important shield law question is whether or not the confidential privilege granted to newsmen applies under any circumstances at all times—or whether it is limited only to information obtained in confidence in the course of news gathering.

A case growing out of the insurrection at Attica Correctional Facility in 1971 deals directly with this issue.

A newscaster from a Buffalo station was interviewing two inmates inside the walls.

A cameraman from the same station was also inside the prison. Suddenly, the two inmates being interviewed were allegedly brought before a kangaroo court and the newscaster was compelled to read his notes there.

The two inmates were found "guilty of treason" by the kangaroo court and led off.

Subsequently, they were found murdered. The newscaster and the cameraman refused to testify before a grand jury as to their knowledge of the case.

The court has ruled against the two men on the basis that they are being asked asked to testify on events they happened to witness themselves as individuals—and not on events that had been related to them, in confidence, by other people in their capacity as newsmen.

This case is also on appeal.

Should the Federal Government preempt?

Finally, I have been asked to cover today the question of whether Federal law should preempt State law in this area.

As a general rule, I favor a climate of federalism that encourages imagination, innovation and creativity at all three levels of government.

This is healthy, vital federalism.

Applying this philosophy to the shield laws, I believe we need a Federal law to provide nationwide protection of the press, especially in those states where no shield laws presently exist.

It is in the best interest of all the people that nationwide protections be established for those engaged in the occupation of news gathering.

At the same time, I do not favor having the Federal Government preempt the field.

I recommend that any Federal law enacted expressly reserve to the states the right to enact measures which are consistent with but go beyond Federal protection.

And finally, in considering Federal legislation in this area, may I suggest, on the basis of New York's experience, that particular attention be paid to the following fundamental questions:

To whom and to what kinds of information is the testimonial privilege intended to apply?

For example, is a reporter who happens to observe, let us say, an automobile accident, or a murder, exempt from the obligations of an ordinary citizen to assist the authorities merely because he is a newsman?

The exemption of a newsman to give testimony under any circumstance is not in the intended spirit of the shield laws.

What we have worked toward in our New York law, and what is necessary in a Federal shield law, is a sense of balance between two vital objectives—the necessity to maintain a free flow of information and reasonable requirements of effective law enforcement.

I am fully aware that some newsmen and newspapers, newscasters, radio and television stations are not infallible founts of information.

I am fully aware that some news coverage is slanted, incorrect and sometimes extremely unkind to elected officials.

But as Churchill said of democracy, "It is the worst form of government—but it's better than all the other ones that have been tried."

So it is with the press. It may be an imperfect institution. But it is positively indispensable to the maintenance of a free society.

And shield laws are absolutely indispensable to keeping a free press truly free.

Thank you, sir.

Senator **Ervin**. Governor, the subcommittee is deeply grateful to you for your very wise exposition of this subject, and particularly for giving us the benefit of New York's experience under its State shield law.

As I understand the New York shield law as explained by you, it undertakes to deal both with the question of unpublished information and the sources of the information. Where the information has been made public by those who gather it, it then loses its confidentiality and confidentiality is restricted to the unpublished information; is that correct?

Governor **Rockefeller**. Unpublished information that was obtained either expressly on a confidential basis or implicitly on a confidential basis.

Senator **Ervin**. In other words, you would have a requirement of confidentiality with respect to information?

Governor **Rockefeller**. Exactly.

Senator **Ervin**. Since I share your philosophy on government, I was particularly impressed by your recognition of the fact this is a field in which Congress would have the power to legislate, but as a practical matter, it would be unwise for Congress to enact a Federal law which would preempt the entire field.

I think that is the recognition of what I think is one of the most valuable aspects of our constitutional system. We should recognize that the States do have, even in fields that have a national interest, a very fine part to play in the sense of being laboratories for experiment. I think that you have made a most valuable suggestion here in suggesting that any act that Congress might make should embody a provision leaving to the States, the right to go beyond the Federal statute as long as they comply with the minimums of the Federal statute.

Governor **Rockefeller**. If I could amplify on that just a word, Senator. I think we have a perfect case in point of where we have a national problem which is already recognized by 19 States who have acted, showing that the States, because of particular circumstances, and being free to act, have moved ahead of the Congress.

I feel equally strongly that the Congress should give basic protection to the entire country.

However, the concepts that may be developed by the Congress, which we would all obviously accept, may not go as far in terms of the best interests of the communities in which we happen to live. Therefore, we should be free to take that additional step. You have to develop legislation that represents all of the people as seen by their total representation and we have a more limited area, and that is true for 50 areas of the country.

I think our Federal system is an extremely powerful system. It gives the opportunity for initiative, which is particularly important, in a period of rapid change in the way in which we live.

I think it is an ideal combination and I am deeply grateful to you, sir, and your committee for the initiative you have taken, which is crucial for the basic beliefs we hold for the future of our country.

Senator Gurney. I would like to echo the sentiments of the Chairman, Governor, and say it is very helpful to have this information of how the workings are of a very large and working state.

Do you have any idea of how many cases have arisen?

Governor Rockefeller. Very few. We have very few cases. I could not give you the number, but I will send it to you.

The interesting point to me is that this has been accepted by both of the prosecutors and the press, meaning the media, as a sound and logical structure and therefore there have been very few challenges to the application which is automatically applied by the law enforcement people.

Senator Gurney. And the law enforcement people do not think it is really any hindrance to their work?

Governor Rockefeller. No, they do not. This is very interesting. As a matter of fact, as I mentioned, Judge Fischer, who is our statewide prosecutor, feels that it is tremendously important that the law be there to protect the press so that the press can make a revelation which in many cases they are not able themselves because they do not have the staff to obtain and some of their best cases have come from revelations made, and I think as a politician and officeholder, I have to say that all of us in office are aware of this constant scrutiny by the very energetic and imaginative and aggressive media representatives who are gathering news, and it is a very healthy and important force in our country.

Senator Gurney. In other words, the law enforcement people feel without a shield law they might not be able to pursue their job as effectively?

Governor Rockefeller. Exactly, because they would not have the sources developed by the media.

Senator Ervin. Governor, it seems to me that the experience of our country has shown that in respect to corruption, which those engaged in it seek to conceal, we have to depend in a large degree on investigative reporting to ferret out all crime.

Governor Rockefeller. You are absolutely right.

Senator Ervin. And of course, anything which tends to dry up the sources of that information from investigative reporters, really in the long run handicaps enforcement of the law.

Governor Rockefeller. Exactly.

Senator Ervin. Thank you very much.

Governor Rockefeller. I am very grateful to you, Senator. It was a pleasure and a privilege.

Mr. Baskir. Mr. Chairman, our next witness is Dr. Frank Stanton, who has consented to step aside for Dr. Korry.

The next witness is the Honorable Edward M. Korry.

Senator Ervin. I wish to welcome you to the subcommittee and express our deep appreciation for your willingness to come and give us the benefit of your observations in a field in which you and the organization which you represent are most knowledgeable.

STATEMENT OF EDWARD M. KORRY, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Mr. Korry. Mr. Chairman, I am very grateful for this opportunity to testify. I apologize for the fact that you are being so badly shortchanged in that my association recalls with great pleasure your appearance before it when you explained to them what was happening in contemporary terms with respect to first amendment rights.

I come here not only as president of the Association of American Publishers, but as one who worked for 20 years in the daily press, magazines and broadcasting media, and 10 years as a representative of this country as Ambassador to Ethiopia and to Chile. Therefore, I know both sides of the fence.

In the interest of speed, I intend to summarize the statement which I have submitted to your committee, sir, and I want to emphasize today a point that was overlooked in the New York legislation to which Governor Rockefeller has just referred: That is, the exclusion of books and authors.

You have heard, and you will be hearing many spokesmen from newspapers, magazines, radio and television. They will argue that free flow of information in this democratic society now requires the the daily, periodical, and electronic press be protected from forced disclosure of information or sources to Government tribunals.

The publishers who form the association of which I am president and who are responsible for approximately 75 percent of the publication of books in this country probably would not have viewed as urgent, as necessary the legislation you are now considering. We would have been content to rely on the language of the first amendment and believe it was absolute in its protection of freedom of speech and the press until the 5-to-4 decision of the Supreme Court, handed down last June 29, which held writers are not exempt from governmental subpenas of their testimony which cover possible commissions of a crime.

We are pleased that most who have appeared before this committee, and who will be appearing before it, are advocating the inclusion in proposed legislation of protection for books, authors, editors and publishers of books. Most of the legislation introduced into the Congress to deal with this issue covers books, specifically or implicitly.

Like the Supreme Court in 1938, in the unanimous decision in *Lovell v. City of Griffin*, we hold as did Chief Justice Hughes, that the liberty of the press is not confined to newspapers and periodicals, but that the press in its historic connotation comprehends every sort of publication which acts as a vehicle of information and opinion.

What is a book? What distinguishes a book from other media of communication of information? What is its important contribution to the public's right to know?

One, it is not local. It is distributed throughout the country and indeed beyond. It is not licensed or subject to the pressures that emanate from licensing. It is not subject to threats of petty retribution, from advertisers or subscribers. It is not usually restricted to any editorial viewpoint: That is, most publishers publish many different sides of the same question. Books are a vital medium.

Let me refer to the essential nature of books and what happened in the War between the States in the South, which had been almost totally dependent upon books produced in the North. In its worst moments, the South found that it had to divert resources away from the war effort in order to publish books, because without books the public is weakened and less informed. Indeed, the South was literally forced to invent its own book publishing industry.

There is another element that highlights the importance of books. With the demise of *Life* and *Look* magazines, books are increasingly becoming journalistic outlets. We find today the instant journalistic book. As soon as the President visits China, within the week there is a book on the newsstand. When the Pope goes around the world, there is a book that immediately appears throughout the country. Moon journeys and many other events illustrate this trend. Journalists, working journalists, are increasingly turning to books to expand and develop the themes which they have been investigating as daily newspapermen or representatives of the media.

I only have to mention such names as David Broder, Jules Witcover, David Halberstam, and many others known to you, sir.

It would be patently absurd to say you can have a law which affords protection to people and then leave naked those same people when they were using the same sources of information, dealing with the same kinds of information, but put their work into a book. This would create a rather grotesque legal situation.

Now, the definition of an author sometimes provides drafting difficulties. I recognize that. But it goes without saying that a person who has established himself as an author would be deserving of protection. Similarly, a person who had received commission from a publisher to write a book would have sufficient grounds for claiming protection. A writer who had received an advance royalty would certainly, in our view, be qualified.

The courts do not seem to have much difficulty in recognizing those people who are authors, who have made their living from writing. The IRS seems to have little difficulty in identifying who are writers, who are authors and who are not. I think if there is a difficulty, it is the kind of difficulty that we encounter when we say what is day and what is night. We know that day turns into night. We know when we have reached that point. There is a line at some point, but it is possible and it is certainly not beyond the powers of this committee to identify that line.

Finally, sir, I would like to say that the Government claims that we should trust it, that there is no need for further legislative action. That may have been true before June 29 of last year, but I would only say that in the case of the Unitarian Universalist Association, a religious denomination with a book publishing arm, the Beacon Press, that its experience with the Justice Department, following the publication of the Pentagon Papers, convinces us that some protective legislative action is necessary.

Another Government agency attempted to interfere with another publishing house when *The Politics of Heroin in Southeast Asia*, written by Alfred McCoy, recently came out. Before its publication, they asked to see the manuscript and attempted to influence the publisher to make certain recommendations and other changes.

A great French fablist wrote that mistrust is the mother of safety, I do not believe that we can afford to trust the words of those who say we have not done anything yet, we have guidelines, why do you not just leave it the way it is. It is the natural process of things, Jefferson said, for liberty to yield and for government to gain.

That is why I am here today, sir.

Senator ERVIN. Well, I am grateful to know that you share a conviction which I have. We not only need laws to protect the Government against the misdeeds of individuals, but we need laws to protect individuals against government. I think that that is one of the principal reasons why the Constitution of the United States was written and especially why the Bill of Rights was inserted in it.

Mr. KORRY. I could not agree more, sir.

Senator ERVIN. I am very much intrigued by your view that the same protection should be given to books as is given to other forms of journalism. I think until the last few years books were not involved quite as much in investigative reporting as they are now. Because with the demise of such journals as *Life*, the books are having to supplant the field of activity which was formerly covered by such journalists.

Mr. KORRY. One of the things that is happening, as part of the revolution in communications, is the introduction of machinery that will enable tens of thousands of books to be published within a matter of a day or two. I am grateful to Mr. Stanton for yielding his time. I am accompanying five Soviet publishers, indeed people who control the entire Soviet industry, around this country. I am taking them later to Crawfordsville, Ind., to see one of these belt presses in operation which print a book from start to finish by the thousands an hour.

The journalistic aspect of books is going to expand enormously.

Senator ERVIN. I am also interested in your reference to the Pentagon Papers. Along with Senator Saxbe, I had the privilege of arguing the *Gravel* case before the Supreme Court in behalf of the Senate.

The Court for the first time, wisely held that the privilege given a Senator or Representative by the speech and debate clause also covered the aides who assisted him in the performance of his legislative duties. But unfortunately, I think the Supreme Court gave a very narrow interpretation to the speech and debate clause. It recognized that neither the Senator nor the Representative or their aides could be required to testify to what was said in a speech and debate or what occurred in committee.

But they virtually held that the courts could inquire into how the Senator or Representative or his aides got the material that was used in the speech or committee proceeding. That limits the speech and debate clause protection to a point where it is almost negligible in value and it makes it impossible for the Congress to obtain information from the Executive. Any aide which obtained classified information could be convicted of receiving stolen information even though the very security of the existence of our country might depend upon the divulgence of that information which some official is trying to hide. And that almost destroys the value of the speech and debate clause of the Constitution.

I hope there will one day be a majority of five, that will give a more practical interpretation of the speech and debate clause.

I am prompted to make those remarks because of your reference to the Pentagon Papers. I will never forget perhaps one of the greatest Presidents who occupied the White House, Thomas Jefferson, who said one of the important duties was the informant duty, not only to inform his colleagues, but the general public.

I think that should be recognized much more effectively in the Gravel case than the Court was inclined to do.

Senator Gurney. I wish to thank you for bringing to your attention the very subject of books. I think you are the first witness that has discussed this at any length. Most of the testimony focused on newspapers and newspaper people are just one question.

Have there been many instances involving confidentiality in books besides the ones you mentioned in your paper that you could tell us about?

Mr. Korry. No, these have been the only ones. Both of these instances that I mentioned, as well as a third involving a former employee of the Central Intelligence Agency. The third instance raises another set of problems that I do not think really pertain directly to the matters under discussion here today.

The first two instances I cited are all within the last 6 or 8 months.

In the case of the Unitarian Universalist Association, after the publication of the Pentagon papers by their publishing house, the Beacon Press, the entire association, which is a religious denomination, was investigated without the knowledge of anyone concerned with the association or the Beacon Press, as to the bank statements of the association and each member's contribution to that association. This was manifestly an attempt to influence publishing.

It had, according to the publishers of Beacon Press and to the association, a very serious effect on a religious organization. It raised all sorts of first amendment questions.

In the case of Mr. McCoy and *The Politics of Heroin in Southeast Asia* which is only a matter of 2 or 3 months ago, again there were very serious issues debated within the publishing fraternity as to whether the publisher should even submit the manuscript to the CIA in advance. There was a great deal of opposition in our association to one of our members having done that.

The publisher in question did not agree at any time to excise or change in any way the manuscript, but again it was manifestly an attempt to influence his judgment. This is what we are concerned about, those two instances.

As far as the confidentiality is concerned, I would repeat that mistrust is the mother of safety. Once the executive branch attempts to limit the first amendment rights, we get very nervous, very sensitive to what a grand jury on a fishing expedition might do; for example, what others might wish to do.

Senator Gurney. Whatever became of the manuscript case? Was it submitted?

Mr. Korry. In the case of McCoy, the manuscript was submitted but with a prior statement by the publisher that he was simply cooperating in handing over a manuscript that concerned that agency, but he would not change the manuscript in any way. He was willing to look and see what the agency had to say about it, but he was not going to change it.

Senator GURNEY. Did they seek that from the publisher or the author?

Mr. KORRY. I believe they wrote the publisher, yes, and the author was quite at variance with the publisher on this matter as to whether you even—as a matter of courtesy, handed it over.

Senator GURNEY. Was there any——

Mr. KORRY. So he has said—excuse me. He has been quoted in the press.

Senator GURNEY. Any comment made by the CIA?

Mr. KORRY. They did.

Senator GURNEY. They did what?

Mr. KORRY. They submitted a number of suggested changes.

Senator GURNEY. But the publisher did not adhere to those?

Mr. KORRY. None.

Senator ERVIN. I take a lot of consolation out of the fact that the grand jury in Boston, which was asked to do something about the publication of the Pentagon Papers, took no action and therein manifested much more wisdom than the Department of Justice. It shows the grand jury had some appreciation of what the first amendment is all about.

I notice you did not repeat all your statement, so let the record show the entire written statement submitted to the committee be printed in full at this point in the body of the record.

[Prepared statement follows:]

TESTIMONY OF HON. EDWARD M. KORRY, PRESIDENT ASSOCIATION OF AMERICAN PUBLISHERS, INC. BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY

Mr. Chairman and members of the subcommittee, it would be difficult to find a more appropriate point of departure for our statement to you today than recent declarations by the Majority Leader of the Senate and the Chairman of the Subcommittee.

In his remarks to the Democratic Conference at the opening of the 93rd Congress, Senator Mansfield said: "We share with the President and the Courts a constitutional responsibility to protect the freedom of the press to operate as a free press." And you, Mr. Chairman, in your talk to the North Carolina Press Association, as recently reprinted in *The New York Times*, stated: "The Founding Fathers staked the existence of America as a free society upon their faith that it has nothing to fear from the exercise of First Amendment freedoms, no matter how much they may be abused, as long as truth is free to combat error * * * A free press is vital to the democratic process * * *"

You have heard and will hear many spokesmen for newspapers, magazines, radio and television argue that, in the light of the Supreme Court's *Caldwell-Branzburg-Pappas* decision of last June, the free flow of information in this democratic society now requires that the daily, periodical and electronic press be protected from forced disclosure of information or sources to government tribunals. Our Association not only supports and underscores that testimony, but adds an urgent—although, we hope, unnecessary—reminder that books, their authors, editors and publishers are as much entitled to First Amendment protection as is any other medium of communication.

Mr. Chairman, the publishers who form our Association—and who are responsible for at least three-fourths of the annual U.S. book production—probably would not have viewed as urgent legislation such as you are considering, before last year. We would have been content to rely on the language of the First Amendment and to believe that it was absolute in its protection of freedom of speech and of the press. But that, of course, was before the Supreme Court spoke in its 5-to-4 decision of last June 29 and held writers not exempt from governmental subpoenas if their testimony concerns the possible commission of a crime. We have no doubt but that a reporter, broadcaster or author would not hesitate to come forward and give testimony voluntarily if he were convinced as a responsible and compassionate citizen that a human life or the nation's welfare depended on what he might say. But we believe that, as a member of the press, he must not be compelled to testify and to reveal information or sources—certainly not in cases of lesser moment.

No one, we believe, can seriously question that books are entitled to the full scope of First Amendment protections, and most of the bills introduced on this subject make this clear—some more specifically than others. Inclusion of books is clearly stated in the bills with broad support from the communications and information industries.

The Supreme Court was unanimous in 1938 when, in *Lovell v. City of Griffin*, then Chief Justice Hughes wrote:

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which accords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated."

The book, it has been often said, has become the pamphlet of our time.

In recent testimony on this issue, Mr. Dan Lacy, Senior Vice President of the McGraw-Hill Book Co., said "it is generally impossible to make a distinction solely on the basis of the physical form of the media." Mr. Lacy noted that investigative reporting often reaches the public in the form of a book: e.g., Ralph Nader's *Unsafe at Any Speed*, or the late Rachel Carson's *Silent Spring*, or Seymour Hersh's *Mylai Four*.

Moreover, general news also often takes that form, as you will recognize from the appearance of such "instant" mass-market paperback books as Bantam's *The President's Trip to China*, which appeared within days of the conclusion of the Mainland China visit by Mr. Nixon. Furthermore, with the demise of such general-audience magazines as *Life* and *Look* and the *Saturday Evening Post*, it would be logical to expect the book to assume an even-greater role in bringing "news" to public attention.

Books afford an advocate unrestricted freedom to express his views directly and forthrightly: they are not subject to dilution by commercial or extraneous messages. Book publishers do not work under the fear of losing a government license nor, generally speaking, under threats of petty retribution from advertisers or subscribers. Book publishers often publish several books on the same subject expressing diverse and divergent points of view—with some or all of which the publisher may himself disagree. Thus books are every bit as vital to the spread of information in a free democracy as are newspapers, magazines and the electronic media.

Nor do we believe that statutory protection from government harassment must be extended only to the writer regularly employed: the free-lancer, whatever his medium, serves a social purpose equally as valid as that of the author or reporter under contract: Tom Paine wasn't exactly anyone's hireling when he published the attacks on the British monarchy in *Common Sense* that furthered the cause of independence for the American colonies. The line of recognition that the American tradition of press freedom extends also to the free-lancer can be traced throughout our history—through the antislavery social reformers of the mid-19th century, the muckrakers of pre-World War I, and, more recently, to such writers as Rachel Carson.

Last year, our association filed an *amicus* brief in support of Thomas L. Miller, who was subpoenaed before a federal grand jury in Arizona. He did not happen to be a book author, but a former reporter for the College Press Service, who had become a free-lance writer on the youth culture and radical political movements for several nonconformist publications. In our brief, we noted that the members of our association "publish substantial quantities of material written by reporters and other authors who must guarantee the confidentiality of their sources.

"The vast majority of such authors," we said then, "are free-lance writers who are not regularly employed by the publisher or any newspaper, broadcaster or magazine and who write on the broadest variety of topics of general and special interest.

"Accordingly, the association is vitally interested in the scope of protection offered by the First Amendment to the United States Constitution to material obtained in confidence and also in freedom from government interference with the process of publishing."

Surely there is no need to dwell on the fact that many reporters write books, drawing basically on the same sources used in their newspaper or broadcast reporting. The names of David Broder, Jules Witcover, J. Anthony Lukas, David Halberstam, Mike Royko, Bill Moyers and Tom Wolfe come readily to mind, but there are, of course, many more. It would be absurd to contend that such writers are to be shielded from subpoenas as to their sources and information when they write for one type of publication—but not for another.

Inclusion of books in "shield" legislation would appear to raise a difficulty in the definition of an author, but we suggest that this problem is not one of major proportions. Obviously, the author of a published work on the subject under inquiry would be protected. Certainly just as Peter Bridge testified recently that "the newsman's license is his paycheck," so there would be no difficulty in equating an unpublished author with his royalty advance check and contract. And surely the courts would have no trouble recognizing as legitimate an author who, even absent a royalty check or contract, has made most of his living by writing. And the unpublished author without such background, if he could not produce a manuscript or outline together with testimony as to his serious intentions, would present the courts with an issue of fact such as they are called upon to determine every day.

Sen. Mondale's bill, S. 637, as modified, attempts a broadly-inclusive definition of who is to be covered. Although its language may not yet be perfected, it does demonstrate that the problem need not baffle a competent draftsman.

Admittedly there are differences of opinion, both within the Congress and among press groups, as to the desirability and even the constitutionality of federal legislation which protects the writer from subpoena under all circumstances and at every governmental level. On the latter point, we would cite the opinion of Mr. Irwin Karp, Counsel for the Authors League of America last fall, to the effect that since the gathering and disseminating of information is bound to be interstate in character, Congress has authority to enact a preemptive statute under the First and Fourteenth Amendments.

Others better qualified will argue the constitutional issue at length, but the Supreme Court has held on many occasions that determinations of state courts and legislatures must give way when they conflict with constitutional guarantees.

Clearly, the Constitution allows the Congress to legislate in this area for the states as well as the federal government. And the practical need for pre-emptive legislation is readily apparent. The goal here is to afford the public access to information by preventing the drying up of confidential sources. Those who are willing to speak and divulge information only in return for a guarantee of confidentiality cannot be satisfied with protection in federal proceedings alone. If in one proceeding in one state compulsory disclosure of identity and confidential information can be forced, there is no genuine guarantee—sources will remain silent and stories will not be written; the public will be denied its First Amendment right of access to information.

This is not an "academic" concern. Recent experience has shown that contempt citations and jail sentences have in fact resulted from the absence or inadequacy of state legislation. Federal protection alone would not have prevented those intrusions into the workings of a free press. Moreover, much of the important investigative reporting of our time deals with local issues. As stated by the Supreme Court in *Near* v. *Minnesota:* ". . . The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, *emphasizes the primary need of a vigilant and courageous press, especially in great cities.*" What the Court said in 1931 could not apply more aptly to the need for a Peter Bridge in 1972 to pursue his investigations, yet the state shield law did not protect that "primary need" in his situation.

Not only does the subject matter of investigative reporting require a preemptive statute, but the extent of dissemination and distribution equally requires uniform national protection. While some newspapers or television programs are directed only to a local audience, many of these carry columns or news items which are syndicated nationally. Certainly books are generally distributed throughout the nation. Subjecting their authors, editors and publishers to compulsory disclosure of sources and confidential information in some proceedings in some jurisdictions would vitiate the purpose for protection in federal proceedings. In short, we believe that shield legislation must apply to every federal and state proceeding in the nation.

As a safeguard, it would perhaps be wise to include a severability clause in whatever legislation is enacted. This would insure its preservation at the federal level, even if its validity at lower levels were rejected by the courts. Such a statute still would have the effect of demonstrating congressional intent to state and local legislative, judicial and administrative bodies, where, as we have noted, the most blatant abuses of press freedom have occurred.

As for the issue of absolute vs. qualified legislation: One cannot fail to be persuaded by the testimony of men who have spent time in jail to defend their right to protect confidential sources that to qualify First Amendment protection is to open loopholes that cannot adequately be delimited and that will be enlarged and abused by a lazy prosecutor, a "fishing" grand jury or an overbearing judge.

While we are familiar with the reasons given by those who favor certain qualifications, we believe that the goals of law enforcement will be better served by the unfettered workings of a "vigilant and courageous press." In terms of competing interests and priorities, only the Sixth Amendment's grant of compulsory process to the accused in a criminal proceeding for obtaining witnesses in his favor raises a substantial issue of conflict. Yet, even an absolute shield law can be squared with the Sixth Amendment.

Clearly, a defendant in a criminal proceeding cannot compel testimony of a witness who would be placed in a position of incriminating himself by his own testimony. In the absence of a grant of immunity—unlikely where it is the defendant and not the state seeking testimony—that situation is effectively no different from one which an absolute shield law might create.

Practically, however, this potential conflict of competing constitutional safeguards is unlikely to arise: Witness testimony previously given by others in these hearings, that in those few instances where a need might arise, those covered by this legislation would testify voluntarily.

With respect to the Justice Department position that the Attorney General's Guidelines on Newmen's Subpoenas make legislation unnecessary, we suggest that these guidelines are at best subject to amendment or abandonment by this or succeeding attorneys general and, at worst, may be breached, as they themselves state, in "emergencies or other unusual situations." Nor, of course, do those guidelines specifically encompass books and authors within the meaning of "the press"—and we have recently seen instances where the Government has demonstrated something less than deep respect for the freedom to publish books without governmental restraint. In support of that statement, one might cite the Justice Department investigation of the entire Unitarian-Universalist Association, a religious denomination, because its book-publishing arm, the Beacon Press, published the "Pentagon Papers" *after* they were in the public domain; and the "request" by the Central Intelligence Agency to examine the manuscript of *The Politics of Heroin in Southeast Asia*, by Alfred W. McCoy.

In short, Mr. Chairman and members of the Subcommittee, publishers believe that the First Amendment, in its absolute language, applies to the entire press—books very much included—under all circumstances and at all governmental levels—and that the liberties it guarantees cannot and must not be negotiated or divided.

Thank you.

Senator ERVIN. Thank you very much.

Mr. KORRY. Thank you very much.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Dr. Frank Stanton, vice chairman of the Columbia Broadcasting System.

Senator ERVIN. Dr. Stanton, I am delighted to welcome you to the subcommittee and express our appreciation for your willingness to come and give us the benefit of your observations in the field in which you are not only most knowledgeable but have had a very unpleasant experience on one occasion.

STATEMENT OF FRANK STANTON, VICE CHAIRMAN, CBS

Mr. STANTON. Thank you, Mr. Chairman.

Before addressing myself more specifically to the opportunity this committee has to strengthen the freedom of the press at a time when one inroad after another is being made upon it, I would like to touch very briefly upon the context in which I think this whole question of a free press should be discussed.

It seems to me that the focus has been far too much on the press and not sufficiently on the public.

No one ever conceived of the first amendment as a means to create a privileged class, made up of journalists, who were, for their own sakes, to be given immunity from certain legal obligations to which everyone else is liable.

The rationale of the first amendment, as is emphatically clear in all the literature contemporary with the Bill of Rights, is that you cannot have a workable democracy—a self-governing people—unless those who make up that democracy and unless those people, who in our system are the ultimate governor as well as the governed, have access through the press not only to the facts but to critical appraisals of those facts—unfiltered by any Government agency, unrestricted by any accountability to government and undeterred by any liability to reveal sources or unpublished information.

Simply stated, that is the central proposition facing us just as it faced the Constitution makers nearly two centuries ago?

And when we lose sight of it, when we talk of privileges for newsmen, as if they were mere personal indulgences, and when we convey the impression that the first amendment exists somehow for the benefit of a few rather than as a basic and essential right of all—the right to know because of the need to know—then we are clouding rather than clarifying the issue.

I think it might be useful for all of us to bear in mind constantly that we are not here in the interests of newsmen or of any news medium. We are here in the interests of the American people. We are here to protect and preserve a right absolutely essential to them, if this republic is to survive as the political instrument of a free people.

That is why I am here; and that is why, I am sure, this committee has given such high priority to this matter.

When I appeared before the Subcommittee on Constitutional Rights in September of 1971, it was considering how to "create a better appreciation of the first amendment's purpose and its crucial importance to a free society." I regret that since then there have been repeated erosions of both the purpose and the spirit of the first amendment rights.

No one who believes in the principle that a democracy cannot adequately function unless the press is truly free to gather and report news and information essential to the citizens' understanding of public events and issues can view these invasions of its freedom with anything but the gravest alarm.

This committee has the opportunity to begin a reversal of this erosive drift. It can take a giant step in the direction of assuring a freer atmosphere in which newsmen can carry out their responsibilities to the public—an atmosphere in which the crippling fear of governmental restrictions or sanctions is eliminated, as the first amendment fully intended it to be.

This can be achieved to a significant extent by favorable action on legislation to protect those carrying out their responsibility to inform our citizens from being required by governmental action to reveal unidentified sources and unpublished information.

It has been suggested that it is unwise to legislate in this field because legislation by its very nature can be limiting. I agree that freedom of the press is more secure when no legislation is needed to define or protect it. Unhappily, the facts facing us today argue against this. Too frequently newsmen are being jailed because they carried out their responsibility to inform the public and met their moral and historic obligation not to disclose certain information or sources.

Even more actions against newsmen are probably being restrained by the pendency of these hearings and those on the House side.

There is little question, however, that because professional journalists are not likely to abandon or lower their professional standards, there will be more jailings if subpenas continue to be served. CBS sees no alternative to strong remedial legislation if this disastrous trend is to be arrested.

The various bills before this committee are not aimed at protecting the private interests of news and information gatherers. They are intended to protect and secure the public's interest in obtaining, through the instrumentality of a free press, news and information—some of it inevitably critical of public officials and the Government.

Much of this would not be available to news gatherers if they were regarded as an investigatory arm of the Government or of private litigants. This fundamental purpose of the first amendment was articulated by Mr. Justice Frankfurther:

> Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of speech must be viewed in that light and in that light applied.

That legislation in this area is considered by many essential is evidenced by the increasing number and varied scope of bills being offered in both Houses, which attempt to protect the news media from subpenas that would seriously restrict newsmen from carrying out their responsibilities.

These bills all seek to prevent a fundamental enervation of the traditional role of the free press, as the chief safeguard of the democratic process. On the whole, they reflect a serious effort to fulfill the great purpose of the first amendment. CBS believes that the free flow of information to the public will be best assured by an absolute privilege—such as is provided for in S. 158, introduced by Senator Cranston.

While our society necessarily takes a serious view of the general obligation of citizens to give testimony pursuant to legal process, a number of situations are recognized in common law or created by statute where persons are excused from giving testimony in order to accommodate other important social policies. Such privileges exist in connection with the relationships of attorney and client, doctor and patient, husband and wife, and priest and penitent. These privileges have not been found to conflict with the rights of defendants under the sixth amendment. Social judgments have been made that the short term benefit possibly to be obtained from testimony derived from such sensitive relationships is, ultimately, of lesser importance to society than uninhibited communications within those relationships. Such societal judgments may, of course, change over time as society sees these very different relationships as either more or less important to its proper functioning as a whole. The first amendment clearly avows that the free flow of information is of paramount importance to the functioning of a free society, and the central position that the first amendment holds in our constitutional system gives pointed and inescapable emphasis to that importance.

Obviously, the first amendment intended it to be a lasting principle of this Republic that the social benefits to be derived from encouraging free and unfettered communications between news gatherers and news sources would be recognized as at least as great as those rooted largely in tradition.

Indeed, unlike traditional privileges intended to assist the private interests of the confidant, a newsman's privilege is intended to serve a central first amendment interest—the dissemination of news and information which, absent the privilege, would often be unavailable. If that privilege is imperiled—as it is today—the need for its recognition and confirmation by the Congress is manifest.

I disagree with those who, while not disputing the social benefits of encouraging the free flow of information, question the need for legislative confirmation of the privilege in the absence of "proof" that the media cannot carry out their responsibilities without a strong statute. That proposition may have had merit in the past. It is wholly repudiated by the recent jailing of five newsmen. And it is further denied by the fact that in every newsroom today journalists are examining whether a story is worth a prison sentence if the Government or private litigants issue subpenas requiring reporters to reveal unidentified sources or turn over unpublished materials.

Both as a communications executive and as a citizen interested in a robust and independent press, I believe such conditions come dangerously close to undermining and destroying a fundamental ingredient of a free society.

Even before the recent series of jailings, CBS newsmen and other journalists attempted in the *Caldwell* case to articulate, in affidavits submitted to the Federal District Court in April 1971, the chilling effect that subpenas would have on their ability to gather the news. Let me quote some excerpts from affidavits submitted in that case by two CBS news correspondents.

Walter Cronkite stated:

> In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements.

Mike Wallace cited the following example:

> In the course of my assignment to cover Richard M. Nixon in the early stages of the 1968 campaign, I was present at non-public conversations and conferences and was able to talk informally with the candidate and some of his advisers, including the present Attorney General (John Mitchell). Although it was seldom explicitly stated, it was understood that some of what was said on those occasions was not for publication * * * Moreover, ideas were discussed which were tentative and would later be refined or rejected. Had there been any thought at the time that I could be compelled to divulge a full report of some of those meetings, my presence would never have been permitted. As it was, I was able in the course of those sessions to acquire an understanding of the candidate which contributed significantly to my coverage of the campaign and, perhaps more important, an understanding of the President which has been invaluable in attempting to assess and analyze the present Administration * * *

But in addition to the information and notes of its newsmen, the raw data of a broadcast newsroom also includes its unbroadcast visual and aural materials. These work materials must be protected in the same manner as the background recollections and notes of reporters. Their basic importance can be readily assessed by a case summarized by CBS news correspondent David Culhane, in an affidavit filed in a case in which CBS News successfully contested the subpenaing of its outtakes:

> . . . as part of this investigation and to acquire material from which the broadcast report may be drawn, our news gathering team takes extensive film footage of the people and places involved in the newsworthy event, typically including interviews with participants in or witnesses to the event. Since the film footage is used largely in lieu of written notes—that is, is used as the recorded basis from which a final story is edited—far more is shot than is ever intended to be broadcast. * * * I rely heavily on the personal rapport I attempt to establish with those individuals who furnish information and/or those whom I interview. Such essential rapport can be attained, and the entire process of investigative reporting on film can be effective, only if such persons can be assured that the information furnished will be used only for the preparation of news broadcasts and not for a non-news purpose. If those consulted or interviewed by me in my news gathering efforts had reasons to believe, or even suspect, that all of what they disclosed would be subject to subpoena, it is my firm belief that gathering significant news on film would be, at best, much more difficult and less effective, and, at worst, nearly impossible.

Portable electronic devices to record interviews from which they extract the materials which they ultimately publish are also used by print journalists. This was, in fact, the means the *Los Angeles Times* reporter, John Nelson used in his interview with Alfred Baldwin, III. The unpublished audio tapes were subpenaed and led to the jailing of John Lawrence, Washington bureau chief of the *Los Angeles Times*, who refused to produce them.

Even if one were to dismiss as self-serving the newsmen's own assertions that there is a need for a privilege, I am certain that members of this committee must recognize the need for such protections based on their own experiences.

Surely, members of this committee have sometimes given information as background and not for publication or, alternatively, for publication but without attribution as to source. In these litigious times, it is reasonable to assume that such background conversations can lead governmental bodies and criminal and civil litigants to attempt to obtain from the media background material relating to published stories.

Similar considerations prevail with regard to the executive department. It is of relevance here to note restrictions President Franklin D. Roosevelt placed on newsmen at his first press conference:

> I am told [said FDR] that what I am about to do will become impossible, but I am going to try it . . . While I cannot answer 75 or 100 questions simply because I haven't got the time, I see no reason why I should not talk to you ladies and gentlemen off the record in just the way I used to do in the Navy Department down here . . . There will be a great many questions, of course, that I won't answer . . . There will be a great many questions you will ask that I do not know enough about to answer.
>
> Then, in regard to news announcements, Steve (Press Secretary Stephen Early) and I thought it would be best that straight news for use from this office should always be without direct quotation. In other words, I do not want to be directly quoted unless direct quotations are given out by Steve in writing. That makes that perfectly clear.

> Then there are two other matters we will talk about: The first is "background information," which means material which can be used by all of you on your own authority and responsibility, not to be attributed to the White House . . .
>
> Then the second thing is off the-record information, which means, of course, confidential information which is given only to those who attend the conference . . .

Robust and independent journalism includes but goes well beyond obtaining background information from newsworthy figures: It demands that journalists remain independent in their investigative reporting and in covering public events and that they not be viewed as gatherers of evidence for any other purpose.

Protecting the news media from an enforced role as investigatory arms of the government or of private litigants is vital to the preservation and effectiveness of a free press. Both broadcast and print news personnel have found it increasingly difficult to cover public protests and events without fear of physical injury, because the press has been viewed not solely as an institution from which the public gets news and information, but also as a tool whose film and testimony will be used in connection with any ensuing criminal, civil or administrative proceedings. It is because of such situations that we particularly welcome the fact that the unqualified legislation before this committee protests the unpublished material as well as the so-called confidential material of news gatherers from fishing expeditions.

The absolute protection which CBS supports would also extend to congressional proceedings. CBS has firsthand knowledge that threats to journalism do not originate solely from litigants in civil and criminal proceedings and administrative agencies. Congressional subpenas were issued to CBS and me in connection with the broadcast of "The Selling of the Pentagon."

The threat embodied in that case was ultimately overcome only by strong and courageous House leadership. The entire conflict should not have occurred and should never be repeated. The first amendment is a specific limitation on the power of all government, including the Congress; and the Congress must recognize that it, too, can be a source of threats to the intent of the first amendment.

I recognize that, even among those who agree there is an immediate need for statutory protection in this area, there is disagreement as to the appropriate scope of the statute. Some would limit the protections of a statute to so-called establishment media, and exclude what has been termed antiestablishment organs. We at CBS strongly reject the notion that the press can be so divided. The public today receives its information from a multitude of sources, including a thriving "underground press," which no statute aimed at protecting the free flow of information can ignore. The strength of the free press and the protection of the people against abuses by it rest in its pluralism, a pluralism of views, methods and standards as well as of numbers. Any legislation that reduces that pluralism would diminish its own purpose.

While CBS is of the view that an unqualified Federal/State bill is essential, we know that reasonable arguments can be made for a qualified statute. Until recently we also believed it possible to protect news sources and unpublished material by a Federal statute of a qualified nature. We revised our position for a number of reasons.

Several state courts have recently construed qualified statutes extremely narrowly, leading to the imprisonment of newsmen who had otherwise assumed they were protected.

If the purpose of privilege is to assure unfettered communications, that purpose cannot be met if each time a newsman is to receive sensitive information he must decide whether a particular statute is broad enough to cover the facts in his case. Nor is he likely to obtain from lawyers—if I know anything about them—an unequivocal opinion on his ability ultimately to resist a subpena. Moreover, since a news story does not necessarily stop at a state boundary, it is of little solace to a newsman to know that he may be protected in New York State in gathering background material but has problems once he crosses the bridge into New Jersey. Finally, while a state statute may afford protection, a subpena may issue from Federal authorities where no statutory protection now exists. In sum, predictability with respect to resisting subpenas is lacking without a Federal/State unqualified statute.

I am aware of the fact that significant legal issues are raised by a Federal statute covering state as well as Federal proceedings.

I am, however, advised by counsel that the Congress has the constitutional authority to enact a statute applicable both to Federal and state proceedings.

In this connection, I am pleased to submit for the consideration of this committee an opinion from counsel on this issue.

In closing, Mr. Chairman, and in thanking you, the members of the committee, and its staff for this opportunity to present my views, may I emphasize that this country has gone through one of the most tortuous periods in its history. We have all been deeply concerned and deeply disturbed by a decade of a trying conflict in which our concept of our duty was often challenged both at home and abroad. We have endured a period of division and social unrest not paralleled in our land during this century.

We have seen a language of violence replace in many instances the language of words. We have witnessed the abrasive shaking of old values and the agonized emerging of new ones.

They have not been times that make readily for serenity, for dispassionate judgment, or for close reasoning; and we are tempted to do under restless conditions what we would deplore and reject out of hand under calmer circumstances. They are, therefore, just the times when we must be most watchful and most resolute about preserving those basic rights that in the end equip us to survive the periods of trial inevitable in the odyssey of a great nation.

And it is a source of very real reassurance to me that this committee and, I earnestly hope, the Congress will see to it that the most fundamental of all our rights, the right of our people—a free people—to know, will be neither impaired nor eroded because we failed to act promptly and effectively when we saw the danger signals.

Thank you again for your courtesy and attention.

Senator Ervin. Dr. Stanton, you stated on page 10 of your statement that the threat embodied in the "Selling of the Pentagon" case was ultimately overcome by strong and courageous House leadership. I would have to agree with that, but the only reason that strong and courageous House leadership had an opportunity to afford that protection was because you had the courage to brave the possibility of a citation for contempt of Congress in order to protect the confidentiality of your own published information.

Mr. STANTON. Thank you, Mr. Chairman.

Senator ERVIN. I find myself in substantial agreement with most everything you say, but I would take issue with this statement on page 5 in the next-to-the-last paragraph:

> Indeed, unlike traditional privileges intended to assist the private interests of the confidant, a newsman's privilege is intended to serve a central first amendment interst—the dissemination of news and information which, absent the privilege, would often be unavailable.

I believe the privileges recognized by the law are also for very fundamental interests of society, especially the lawyer-client relationship. The sixth amendment says no person shall be deprived of life or liberty without due process of law, and the sixth amendment says the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor and have assistance of counsel for his defense.

I think that the attorney-client relationship also expresses interests that go beyond the private interests of a client. It is necessary to have a full exchange of information between the client and attorney in order for the client to be assured he is not denied due process of law and has really vital assistance of counsel.

I think also the husband-and-wife relationship is founded on the very necessary policy of promoting best interests of society rather than the best interests of the confidant. And, of course, encouraging people who have contagious diseases to go to a physician to receive treatment also serves the interests of public health. I think it all rests upon the very sound needs of society rather than the personal interests of an individual.

Now, I am a little troubled by the breadth of the Cranston bill. I certainly think that we need legislation in this field. I think it is made necessary because in recent times there has been a tendency on the part of those charged with the enforcement of law to appoint themselves as protectors of society and suppress information which they think would be unwise for society to receive. In this respect, those charged with enforcement of law have grossly abused the laws under which the courts function. The great majority of newsmen who go out to gather news obtain information from others, and in the legal sense it is hearsay and not admissible in courts as a general proposition.

I think that the law enforcement officers have grossly abused the subpena process to indulge in "fishing expeditions" in order to convert the news-gathering agencies to an arm of government and save themselves from the trouble of doing investigating which the law clearly contemplates that they shall do. Certainly a news gatherer will not be a competent witness in court as to what he learns from others and those who issue subpenas for a "fishing expedition" realize they are circumventing the very rules which courts must abide by.

I am very much impressed by the opinion of counsel, and while I have some misgivings about the Congress undertaking to prescribe rules of evidence for state courts I recognize this is a national field, that the interstate commerce clause covers the dissemination and transmission of news and opinions over state lines. From a standpoint of journalistic activity this is a country which in effect knows no state lines. I think the Congress has the power to legislate in this field under the interstate commerce clause and under the due process clause of the 14th amendment, which makes the first amendment applicable to the States as well as the Federal Government.

The thing that concerns me about the Cranston bill—it is a very helpful bill in many areas—is that it would almost exclude testimony from a newsman who had actual knowledge of the commission of a crime or had actual knowledge of the fact that a man charged with a crime was innocent. I certainly go along with the proposition that unpublished data should be kept inviolate and also I think where information is obtained, especially information of a hearsay nature obtained as a result of a confidence, ought to be protected.

You have made an excellent statement here. I think you and I shared the same views at the time you testified before the committee in the study of the freedom of the press. We hoped at that time that the Supreme Court would emulate the Circuit Court of Appeals in the *Caldwell* case and hand down a decision like the Circuit Court of Appeals which would balance the interests of society in investigating the crime and the interests of the people in knowing what's going on in this country.

I think the Ninth Circuit did so in a very effective manner in the *Caldwell* case and came up with a very effective decision.

In this case Caldwell was not required to obey the subpena to go before the grand jury. I am sorry, the Supreme Court did not follow the fine precedent set by the Court of Appeals.

I recognize there is necessity for legislation in this field, and I certainly do appreciate the very fine way in which you express the concept that the first amendment was not written for the benefit of a person engaged in collecting and disseminating news. It was written into the Constitution, I think with a twofold purpose, first, to insure that Americans should be free from tyranny over the mind. They should have free minds. Secondly, it was put in the Constitution because those who wrote the first amendment recognized our Government will not operate without the fullest and freest flow of information so that the people may be enlightened. It is not for the benefit of those in the business of collecting and disseminating news, but for the benefit of having informed people in this country.

Mr. **Stanton**. Thank you, sir.

Senator **Ervin**. You have an excellent statement and have been of very great help to this subcommittee as you have on previous occasions.

Mr. **Baskir**. Mr. Chairman, our final witness this morning is Anthony G. Amsterdam, professor of law at Stanford University Law School and counsel for Earl Caldwell.

Senator **Ervin**. I wish to welcome you to the subcommittee and express our deep appreciation for your willingness to appear and give us the benefit of the very considerable experience you have had as an attorney in this field.

STATEMENT OF ANTHONY G. AMSTERDAM, PROFESSOR OF LAW, STANFORD LAW SCHOOL

Mr. AMSTERDAM. Thank you, Mr. Chairman.

I am deeply grateful to the subcommittee for the opportunity to appear.

I have prepared a very lengthy written statement, as members of the committee know. That was not prepared to lengthen, but rather to shorten my presentation. I hope it will be the pleasure of the chairman that that will be received for the record so that I may move on and summarize the major points and allow the subcommittee members to ask questions concerning such matters as they wish to develop.

Senator ERVIN. That is satisfactory to the subcommittee. Let the record show the complete statement submitted to the committee will be printed in the record after the testimony of Professor Amsterdam.

Mr. AMSTERDAM. Thank you, Mr. Chairman.

Senator ERVIN. I might state incidentally that this is a most valuable and enlightening discussion of this problem that you have provided us.

Mr. AMSTERDAM. What I should like to do is to simply describe the essence of this written document and the major positions that I think it is appropriate for Congress to take.

First, I should just say one word about my experience in this area, because it is different from that of many of the witnesses you have heard.

Since I undertook to represent Earl Caldwell in February 1970, I have been called by literally scores of reporters and by attorneys for reporters on occasion after occasion when they have been subjected to either subpenas or demands for disclosure under the threat of subpenas. The publicity generated by the *Caldwell* case and my involvement in it, made me the natural person to call.

I think my experience, therefore, if it would be of any use to the subcommittee, lies in this area: knowledge of the actual, practical workings of the subpena process, of the problems that subpenaed reporters face, and of the specific methods by which Congress has to grapple with these problems if it is going to grapple with them effectively.

Based on that experience, in the first section of my statement I describe the specific harms which subpenas work on the news media. I think it is important to start with specifics and not just the usual "free press" generalities, because in shaping legislation you have to know what harms you are aiming at.

The most important harm, surely, is the effect of compelling disclosure of newsmen's confidential sources. There are others as well. The impairment of the independence of the press by co-opting its functions with the investigative functions of other agencies burdens the press with all of the liabilities of those agencies.

I think that the members of the subcommittee know there are many citizens in this country who will talk to a newsman but not a lawyer or policeman because they do not want to "get involved." If their talking to a newsman is going to cause a lawyer or policeman to get to them and they are going to end up by being involved, they won't talk to a newsman either.

I think it is also fairly clear—and will be clear from the testimony that this subcommittee hears—that within the news media the effect of subpenas is to be divisive. I know of reporters who do not pass news to their editors because the reporter says, "I will go to jail to protect it, but he won't." When a subpena is issued, reporters split as to whether to follow the canons of not disclosing or follow the orders of the courts. None of this makes for a good press that must fully inform about all the things on which people should be knowledgeable.

In addition to this, the costs of responding to subpenas; of taking the time to appear in court, fighting subpenas or testifying under them; of going to jail, if necessary, to protect sources—all of this is a tremendous drain on the function of the press. That is an independent and separate concern that I think warrants Congress' attention.

Finally, there is the problem of self-censorship. When newsmen realize that they are subject to all of these burdens if a subpena is served on them, they will be very much more cautious to print news that will bring a subpena down on the news media.

An editor, for example, in deciding whether to include a detail in a story that is not central to the story—it is just marginal—but he knows that the cost of printing that detail may be to bring a subpena down on his head, will say to himself, "What does a subpena mean?" What it means at the very least is loss of time, legal fees, possibly an internal fight within his own newspaper as to what position to take, and then perhaps a knock-down, drag-out court fight, which is not going to do him any good with some of his advertisers who believe the news media should not obstruct the Government.

I think that kind of pressure, extraneous to the newsworthiness of items, operating 24 hours a day on the thousands of news desks around this country, has the potential to destroy the freedom of the press, upon which we all depend for the dissemination of news vital to our knowledge about the workings of government.

In short, there are several distinct harms that I think Congress needs to act to prevent. Now, it is in the light of these that I have tried to describe in the pages beginning on pages 42 of my written statement the form and scope of an exemption from compulsory process that Congress should give. The points I make in that section are essentially three.

First, I consider who should be protected. My ultimate conclusion is that the scope of protection should be defined essentially in terms of three characteristics. The protection should be given to someone who disseminates news, which I would define as matters of general public interest, so as to exclude, for example, people who communicate information of various sorts, from credit bureaus to private investigators. The news should be disseminated to the general public instead of some in-group, and it should be published on a regular or periodic basis.

I think I would not restrict the exemption any more narrowly than that, but I think those restrictions are necessary lest the exemption go too broadly and affront some of the interests that Senator Ervin mentioned in a dialogue with the previous witness: The interests of law enforcement and the interests of the Government generally in having information for its own vital decisionmaking process.

Second, I consider what harms are to be protected against. The harm that needs to be protected against is the harm to confidential sources. I think congressional protection should at least cover the disclosure of any information which would reveal or impair in any way source relationships of the press.

But I also discuss an additional broader protection—a protection for what you can call work product—that I think is also justified because of the other harms to the press that I have just described: the co-opting of the press to other investigative functions, the destruction of its independence, the burdens on the press of any subpena and the inevitable self-censorship to avoid those burdens.

The third question I talk about is whether the privilege should be qualified or unqualified. There I think some distinctions are necessary that are not frequently talked about. To begin with, I think the distinction is necessary as to whether you are talking about qualifying a protection of source privilege or protecting a work product privilege. If you are talking about a source privilege, I think the argument is tremendously strong to have the privilege unqualified, particularly if the qualification is one that cannot be predicted in advance.

If the qualification is something like "overriding national interest" or whether evidence "goes to the heart of the controversy"—things that a source cannot predict when he talks to the newsman—then the privilege is going to be eaten up by the qualification.

On the other hand, if defined in terms more predictable, such as "imminent danger of foreign aggression" or "danger to human life," that more narrowly defines the area which in advance you know you are not protected. But I would be against even predictable qualifications of source protection because they would stifle sources and would prevent the public from knowing what sources could report in the area defined by the qualification.

It seems to me the public should know about the threat to human life or about foreign aggression. But to stifle the source means not only does the Government not know about it but no one will. This dearth of information could pose very grave and serious harms.

As to the qualification of work product privilege, I think there is somewhat more of an argument. If I may speak somewhat to the points the chairman was making a moment ago about a qualification for what the reporter sees, I might just use that example to point up the distinction I am making.

It seems to me that one might distinguish between what a reporter sees when he is out in a place where everybody can see, and what he sees where he has been admitted to some private place in a relationship of confidence. If a qualification is put on the bill which exempts from the scope of its protection eyeball testimony of a reporter, that will constitute I think, a grave incursion in some instances where protection is needed. Under such a qualification, for example, Paul Branzburg would not have been protected because he saw opium being produced.

I think what the Senator is concerned with here is the reporter being out on the street and seeing a crime committed. Now, I think the testimony that he might give in that situation has a far lesser claim to protection than testimony obtained through a confidential relationship. The reason is not because it is eyeball testimony, but because he achieved it through the use of a confidence which would be harmed or impaired by the disclosure.

Senator ERVIN. You put your finger on one thing that troubles me very much. In the *Branzburg* case, the reporter would never have seen a violation of law if those who violated it had not had confidence in him and permitted him to see. I think he almost had to see it to really be able to report on the matter he was reporting on.

Mr. Amsterdam. I think that is right. I think in that context it makes very little difference whether the confidential disclosure made to the reporter is a verbal one or a demonstrative one. They come to the same thing.

I think the true test is not between eyeball observation and aural observation. I think the distinction is between whether the reporter gets it from the source which could be stifled by a threat of disclosure or comes upon it in a way unaffected by the threat of disclosure.

It seems to me if one is thinking of qualification in that regard, one should limit the qualification to cases that would not impair or reveal a source relationship in any way.

I might mention in connection with the Senator's concern that my experiences with these cases and other criminal cases has led me to the conclusion there is an inverse relationship between the need for reporters' testimony and the seriousness of crimes. Reporters very, very, very infrequently know anything about hardcore crime—street crimes, muggings, murders, rapes, those kinds of things. They are almost never used in those kinds of cases. They are primarily used in youth crimes, marijuana, open-ended investigations into subversive activity, and that sort of thing.

I think one can overstate very greatly the need for reporters in the criminal process. One talks about the privilege of protection of newsmen as obstructing the ability to prosecute crime. We are not talking about hardcore crime. Reporters very seldom know anything about hardcore crime.

Going beyond the question of qualification, my prepared statement touches on the question of what I call the need for procedural safeguards to make an exemption effective in practice. This is the one single most important point that I would like to make to the subcommittee, because, I think it is ignored by too many of the people who are thinking about drafting an approach. The assumption is commonly made that the way to protect newsmen is to give them simply an evidentiary or a testimonial privilege akin to the privilege given attorneys or doctors or priests in some jurisdictions or the husband and wife privilege.

What my statement develops is the theory that a privilege alone will be pathetically inadequate protection for the news media.

I would like to develop that point, because I think it has really not been touched on by others.

I think that to understand why a testimonial privilege is inadequate one has to appreciate the reality of how the subpena process works. Subpenas are not prescreened as a practical matter by any judge when they issue from a court. Most legislative subpenas are not really prescreened by the committees and subcommittees from which they issue. They issue from the staff for the most part, with simply a hasty signature by the authorized committee member.

What this means is there is no brake at all, no procedural protection of screening or safeguard against the issuance of subpenas.

The next thing you have to realize in this context, there will be tremendous pressure for the issuance of improvident subpenas, because the people who issue subpenas do not stop and think—it is not their job to think—whether there is a real need for the reporter and whether the interests of a free press outweighs that need. Their job is investigating: they want to get that information. Frequently a reporter will be the most convenient person to start an investigation with. He is knowledgeable; he knows the identity of the people who can be useful; keeps notes, in short, he is an ideal witness. If you want to start an investigation, you very frequently start with the reporter.

There is a tremendous pressure to start with a press subpena. Add that to the fact that the investigator will assume that the reporter knows more than he does. All the investigator knows is what he would like to get from the reporter, so very often he overguesses how much use the reporter can be.

Now, it would be remarkable in this situation if there wasn't a tremendous outflow of improvident issuance of subpenas—subpenas which mean very little to the investigative or judicial process—although they have tremendously destructive ends on the press.

These subpenas are almost invariably served at the last minute. I think Senator Ervin knows, as any able lawyer knows, all of the reasons why all lawyers serve subpenas almost on the eve of trial. Part of it is the business of backlog service, part of it is that any busy lawyer does not get to his trial process until very late.

Senator **Ervin**. That is true, and anyone engaged in trial practice knows the witness does not come to him until after the trial is in progress.

Mr. **Amsterdam**. Exactly. The result of that is the subpena very frequently issues with the return date a few days away.

The *Caldwell* case began with the subpena served on February 2, with the return date of February 4. If the effect of that is to force the newsman to rely on a motion to quash, it is to force him to rely on a nonexistent procedure. You have no time to get an attorney issue a motion to quash.

I would add you can't rely on a motion to quash for several other reasons. One is in many jurisdictions, and even in the Federal, they will not delay the instant proceeding in order to enforce the testimony of a privileged witness. The subpena may be quashed only if there is nothing to be legally gotten out of the subpenaed party. If we have a privilege which, for example protects confidential sources, you could not quash a subpena totally on the basis that some of his testimony would be exempt. But even if the motion to quash did apply, the timelapse is so slight that it tends to be unavailable in practice under any circumstance. A reporter just has no time to make a motion to quash. What happens is that he appears in court.

I will let you stop and think about that for a moment. He has 2 or 3 days to get into court. Suppose we create a testimonial privilege that is defined in terms of anything that impairs or reveals confidential sources. I think again Senator Ervin will appreciate and the subcommittee will appreciate that in a short time the legal language will develop legal meanings and there will be difficult issues of law that will arise around it. The lawyer for the newsman is going to have to grapple with those issues. But when we say the lawyer, who are we talking about? With 2 days to reply to his subpena, the reporter has to run out and get a lawyer. Most reporters do not have the money for a lawyer who can put in research time as well as court time. Most lawyers are committed for a date 2 days away, anyway, and couldn't put in the time. So it will be a fluke if the newsman comes in adequately represented.

CBS is important and NBC is important and the *New York Times* is important, but it is more important to the people of this country to protect the individual reporter, the small town newspaper, the weeklies. The little fellow just isn't going to be able to get a lawyer and get prepared on 2 day's notice. What is going to happen is he will show up with inadequately prepared counsel or no counsel. He is going to arrive with a judge sitting there and witnesses waiting. The judge will not give a continuance. He is going to say "there are 20 other subpenaed witnesses. I can't hold this case over for some witness' convenience. We are going to dispose of it."

If this is a grand jury subpena, the problems are worse. If the reporter is recalcitrant, he is obstructing the grand jury. So the prosecutor asks, would the judge please rule on the privilege now. The judge will rule. Under these circumstances I respectfully submit the chance of erroneous ruling by the judge is substantial. We have to realize trial judges do err sometimes, particularly in new fields of law, and where counsel is inadequately prepared, the chances are still greater.

What will happen here is a reporter is hauled in, litigates the privilege before the trial judge who makes a mistake. Now what will happen. Appeal. The reporter makes a motion that the contempt order be stayed and that he be entitled to bail pending appeal. That motion will be denied. They do not release recalcitrant reporters pending appeal. That reporter is going to do some jail time.

I have given you a case where, notwithstanding the valid privilege, the reporter ends up in jail for at least a couple of days with all the attendant publicity on sources and other newsmen, owing his lawyer a lawyer's fee to try to figure out what this newsman's protection law is all about, since he had not been prepared to begin with. Unless we realize these realities we simply are not aware of the problem.

I suggest that what is needed is not one protection, but two. I think you have to start with the testimonial privilege, but in addition we must have procedures which will prevent the issuance of improvident subpenas in the first place. In this regard I strongly support the procedural provisions of S. 870, which is Senator Eagleton's bill, which has a well-designed set of procedures which requires the screening of subpenas before issue in order to stem the tide of subpenas. What we are trying to do is to protect the great right of the press to inquire and publish for the good of the public. What threatens that at this moment is the gross flood of subpenas and the publicity that is attendant upon them. The only way to shut off that threat and to free the press is to have an effective check against the issuance of subpenas in the first place. What the Eagleton bill does is to impose this needed screen on the issuing process.

The last two points I make in my written statement I can skip over very briefly. Although the next one that I shall come to is, in my judgment, vitally important, it has been addressed by other witnesses. I am one of those who strongly believes Congress needs to reach the States with this legislation. I believe, and I have set out in this paper my grounds for this belief, that the commerce clause clearly allows the Congress to do this. If the Federal Communications Act is clearly constitutional, which I assume it is, the Newsman's Protection Act would be equally constitutional on the same basis. I do not see the issue—as Senator Ervin described it a few moments ago—that Congress would be prescribing rules for state courts. It is a matter of restricting procedures in state courts which burden a national communication network. I think to look at the press subpena problem from the point of view of the subpena rather than from the point of view of the press is to look at it backwards. What Congress is concerned with is not where the subpena comes from but what it strikes and destroys—and what it strikes and destroys is the national network of the news media.

I think that if anybody thinks for a moment he has to appreciate that even the smallest item of local news may flow into the channels of interstate commerce. The next to last item on the evening news usually deals with a little funny story about what happened to Mrs. Young's dog in Maine. That gets in the news in some way; that is not just an accident. API and UPI and the rest pick up every single item and shoot it across the country.

Senator ERVIN. I think the validity of your observation is very well shown by Paul Harvey. In his daily broadcasts he includes some very insignificant things, which are nonetheless very amusing, that are broadcast in all the States of the Union. Others do the same thing.

Mr. AMSTERDAM. All sorts of news is carried this way. For example, a newspaper in Virginia may be interested in a particular citizen of Virginia who happens at the moment to be living in California and under criminal charges or involved in some criminal investigation. That information could be very well blocked off because the newsmen in California lose a source. The story never gets printed in Virginia, or any other place. If Congress can't prevent that, then Congress did not have the power to pass the Federal Communications Act. It is that simple. I really believe that.

In any event, I have taken more time than I meant because my primary purpose is to try to be of use to the subcommittee by responding to questions that the chairman may have.

What I tried to do in my statement from page 90 is to analyze the various pending bills. I understand the Senator also had a bill which, unfortunately, I have not received in time to look at in terms of preparing the statement. I think I have covered them all up through S. 870, and I hope my analysis of the bills may be of use to the subcommittee.

Now, without more ado, I would like to open myself up to what use the chairman would like to make of me.

Senator ERVIN The large number of bills shows not only the interest in the problem but the difficulty in the problem. One of the most difficult things we have to do is to find the proper phraseology to lay down the rule that will carry the majority. It is very hard to express what you mean because language is a very elusive thing. For that reason we come up with divergent views. I have never been able to draw a bill that is entirely satisfactory to myself. I would appreciate your observations about any defects in my most recent attempt or anything you think of value, to the subcommittee's deliberations.

I do not have any questions to ask you because you have expressed yourself so clearly and understandably. I certainly agree with you in your observations. A right or privilege is not of very much value unless you can get a practical procedure by which it is to be enforced. That is as important in this case as to define what the right or the privilege is. We have to have a practical and pragmatic method of allowing the newsman to assert any privilege or right which may be extended to him.

Mr. AMSTERDAM. I think it is particularly important to understand why this special procedure is necessary for newsmen if not for husbands and wives, and doctors and lawyers. The answer is not that those privileges do not protect as socially important values as those which attach to newsmen, but rather the number of cases which doctors or lawyers are likely to be subpenaed is much less. The news media, on the other hand, have been subjected to a tremendous onslaught of subpenas. It is in that context you have to give adequate protection. It is to shut off this tremendous flow of subpenas against the press.

Senator ERVIN. I think that is a valid observation, because a lawyer or physician or husband or wife doesn't ordinarily go out and complain to the public what is transpiring within those relationships; while, on the contrary, the function of the news gatherer is to gather news that can be publicized. I can understand from the standpoint of a law enforcement officer why there is a tremendous temptation to try to see what he can find out from the news gatherer. I think in the great majority of cases when such subpenas issue, the prosecutor feels it affords him about the easiest way to get some leads. It is quite human for him to succumb to the temptation to promiscuously issue subpenas in the matter they are investigating.

I would certainly be greatly indebted to you if you could send to me by letter some kind of phraseology that would make a distinction between the *Branzburg* case and the case of a newsman who actually sees the crime committed where his knowledge is not gained by reason of any confidence. I think it is a valid distinction.

Mr. AMSTERDAM. If one takes the approach, for example, of S. 870, that protects against anything that would reveal or impair confidential sources, I think that would protect *Branzburg* but would almost invariably allow the newsman to testify to eyeball crimes that he had seen without getting access by leave of any person.

However, I would like to see Senator Ervin's bill because it may be that the scope of what you want to protect may be different than that of S. 870, some additional phraseology may be required. I would be delighted to take a look and communicate with the chairman by letter.

Senator ERVIN. My bill describes two different procedures: under one the reporter may raise by oral objection if he is called on to testify, or he can make a motion to quash. In both cases, it is incumbent on the party desiring his testimony, whether the prosecution or the defense, to make an affirmative determination that he has competent knowledge to be competent as a witness. My phraseology would probably be broader than desired testimony in the *Branzburg* case. Where a man gets information and makes identification solely as a result of confidences, I think those confidences ought to be respected.

Mr. AMSTERDAM. Take the case where, what is shown to the newsman is a document which is both communicative—in the same way in which a verbal statement would be—but which is also evidence of a crime.

You can see it is very difficult to protect the one and not the other. If it is right for the public to know about the one, it is right for the public to know about the other. The source will be cut off equally, whether it is eyeball or by ear, and I think the protection ought to go further. I will be very glad to look at the bill and make any comments on it.

Senator **Ervin**. The procedural matter is made very difficult simply because the newsman is subpenaed without advance notice and without really any opportunity to employ counsel, as you suggest. I would not want a counsel that had his time taken up in the next 2 or 3 days. I do not think he could give you very much advice.

Mr. **Baskir**. The previous witness from the American Association of Publishers made a strong case to protect books and authors. Outside the question of privilege, do you think a bill which excluded anything other than, let's say, a daily or weekly press, would be constitutionally infirm?

Mr. **Amsterdam**. A bill that drew a line?

Mr. **Baskir**. Yes.

Mr. **Amsterdam**. No, I do not think it would be constitutionally infirm. Of course, it is my view, but I can only get four Justices to agree, that the first amendment protects everybody. But I do not think a distinction drawn by Congress would be unconstitutional, because Congress would be providing only statutory protection. Unless the Court does an about-face on *Branzburg* quickly, at the moment there is no first amendment protection in the area at all. Anything Congress does cannot be unconstitutional since the first amendment has been held not to provide any protection.

If there is a rational basis for drawing the distinction between this, Congress can draw the distinction. One thing you ought to note is the *Branzburg* opinion itself. Justice White said one of the major reasons why he refused to give first amendment protection was his reluctance to embark on a long course to an uncertain destination. What he had in mind was that if the Court recognized such a privilege, it would be forced to proceed on a case-by-case basis defining the scope, deciding whether it goes to weeklies, to monthlies, to books, to someone simply planning to write a book, to somebody saying some day I may write my memoirs. Doing that judicially by the slow way of inclusion and exclusion is a laborious process.

I think Congress can do it and it would help the Court out of one of the problems I think it saw in defining first amendment protection.

Now, what is the line. I think the line ought to be drawn in terms of regular or periodic contribution to the news flow. If someone says, I am writing something or I am thinking about writing something or I would like to write something, you have a protection which is unenforcible. You certainly cannot have a subjective test which is simply "good faith." That falls apart in practice. What you ought to focus on—this is the most important reason for giving the protection—is to protect the flow of information to the public and to the media. Is this person a participant in the regular flow of news? The limitation I would impose is whether the person is someone who disseminates news to the public on a periodic, regular basis.

If you draw that line, it is clearly sustainable under the equal protestion clause because it is rational to protect the news flow without going beyond it. It is rational to protect the first amendment.

Mr. Baskir. That would, I gather, include the pamphleteer, so long as he did it once in a while? A regular commentator through his own independent publication, as I. F. Stone used to do, presumably would be protected?

Mr. Amsterdam. Mr. Baskir, if Congress drew a privilege that did not protect Tom Paine then I would be appalled. My task could certainly be to protect pamphleteers who engaged in any regular series of communications to the public.

Senator Ervin. That is a problem that troubled me a great deal. I came up with the definition of a news man as being a person who regularly engages in the gathering of information, of making the pictures for dissemination to the public by means of a newspaper, a magazine or a radio or television broadcast. I think you can restrict it to those. That would allow privilege to be claimed by a person employed by some publication.

Mr. Amsterdam. My own view on it would be that we ought not give exclusive enumeration of media, because the effect of that is to stifle the development of new means of communication which may be particularly important.

I do not think we want to get down on the small guy in effect by having a bill whose effect is limited to established media of communications. My short point is if we cast it in a more general language and talked about dissemination through a news medium and defined a news medium as disseminating information to the public on a regular periodic basis, we may be able not to limit it unduly.

Senator Ervin. Say, by dissemination to the public by any media or any means of communication?

Mr. Amsterdam. Then I would define communication as regular, periodic communication to the general public and I think then we have got it.

Senator Ervin. Yes.

I want to thank you very much for a most helpful paper and most helpful discussion.

Mr. Amsterdam. I want to thank the Senator and the committee for this opportunity to appear.

Senator Ervin. At what point did you get into the *Caldwell* case?

Mr. Amsterdam. From the initial subpena.

Senator Ervin. You argued the case in the Ninth Circuit Court?

Mr. Amsterdam. Yes.

Senator Ervin. I think it illustrates one of my favorite quotes of Jermiah Black, who said in *Ex Parte Milligan* that behind every great judicial opinion is a great lawyer. I am sorry your success was with the Circuit Court and not the higher court.

Mr. Amsterdam. I hope Congress will bail this particular lawyer out of this particular case.

[The prepared statement follows:]

STATEMENT OF ANTHONY G. AMSTERDAM, PROFESSOR OF LAW, STANFORD UNIVERSITY LAW SCHOOL, BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, FEB. 22, 1973

HEARINGS ON THE COMPULSION OF NEWSMEN'S TESTIMONY AND FREEDOM OF THE PRESS

Honorable Chairman and members of the subcommittee, I greatly appreciate the opportunity to appear before the Subcommittee, to present my views on the subject of press subpoenas and related threats to the free functioning of the news media as a source of public information.

Since February, 1970, I have had to give considerable attention to both the legal and the practical aspects of this subject. At that time, I undertook to represent Earl Caldwell, a *New York Times* reporter subpoenaed by a federal grand jury in San Francisco. Because of the publicity generated by the *Caldwell* case, scores of newsmen have called me during the past three years for advice and consultation concerning subpoenas, summons, and court orders compelling them to testify or to produce their notes, working papers and films. Attorneys for newsmen have called me in similar cases. I have also had to deal with numerous instances in which investigative agencies have requested or demanded disclosures from newsmen, not under legal process, but under the threat of legal process. On several occasions, I have met with groups or committees of newsmen to discuss the problems and effects of compulsory process directed against individual reporters and against publishers and broadcasters.

I mention this background for two reasons.

First, I want fairly to disclose any bias that I may bring to consideration of the subject now before the Subcommittee. I have come to that subject not as an academic, but as an attorney for newsmen. The facts that I have never been paid to represent a newsman, and that I speak for no one but myself today, seem relatively unimportant. I volunteered to handle the *Caldwell* case and others because I believed that press subpoenas threatened seriously to stifle the freedom of the press and to inhibit the vital public function of the press. My subsequent experiences have only confirmed those beliefs.

The second reason I mentioned my background is that it points up the areas in which I might be of most use to the Subcommittee. Those areas involve identification of the specific practical problems raised by the compulsion of newsmen's evidence and the specific forms of legislation needed to meet the problems. In this prepared statement, I shall examine:

Page

(A) the harmful effects of compulsory process upon the functioning of the press.
(B) the asserted justifications for compulsory process directed to the press.
(C) the scope and form of the exemption from compulsory process that should be provided to the press.
(D) the need for procedural safeguards to make the exemption effective in practice.
(E) the need for Congressional extension of the exemption and its procedural safeguards to State compulsory process.
(F) the relative effectiveness of the several pending Senate bills to provide needed protection of the press.

(A) THE HARMFUL EFFECTS OF COMPULSORY PROCESS UPON THE FUNCTIONING OF THE PRESS

At the outset, it is important to identify the several ways in which compulsory process drastically impedes the functioning of newsmen, and thereby obstructs the free flow of information through the news media to the public.

1. *Confidential sources*

The most obvious and doubtless most destructive impact of compulsory process upon the news-gathering and news-disseminating operations of the press comes where disclosure is sought that would jeopardize a newsman's confidential source relationships. As the Subcommittee has heard from other witnesses, newsmen in every medium, covering every aspect of the news—domestic and foreign affairs, the operations of government from the police station to the White House, the activities of political militants, presidential candidates, the F.B.I. and the Pentagon—depend critically upon confidential sources of information.

Sometimes the facts and opinions received in confidence are published without attribution or with attribution to a "highly-placed source," a "reliable source," a "knowledgeable spokesman who requested that he not be named," etc. Sometimes the information provided by these sources remains unpublished, but serves other functions indispensable to informed and responsible journalism. To mention just a few of its uses, it may be employed: (a) as a lead in digging out other, non-confidential sources of information; (b) as a framework for assessing the importance or for analyzing the significance of non-confidential information; (c) as corroboration of information from a non-confidential source of unknown reliability; (d) as a corrective of misinformation from the same kind of non-confidential source; (e) as a safeguard against a newsman's drawing the wrong inferences from information in the public domain; (f) as an "advance" or "warning" sign, to alert the newsman to cover coming public events; and (g) as an "earnest," by which newsmen convince news editors that a story is newsworthy, or timely, or sufficiently accurate for publication. Undoubtedly, "backgrounders" are the backbone of a press that strives to be at once inquiring and reliable. Without them, reporters could do little but to broadcast unanalyzed press releases and unchecked rumors.

The Subcommittee has also been told by other witnesses how the threat of disclosure dries up confidential sources and thereby prevents or distorts news flowing to the public. The point is not merely the obvious one that a multitude of specific, vitally important pieces of information which would be conveyed to newsmen upon the condition, or in the expectation, of confidentiality will never see the light of day once confidentiality can no longer be promised or anticipated. (1) More broadly, ". . . Both protection of confidential sources and safeguarding of confidential information relate directly to the credibility of a newsman in the eyes of his sources. This affects the ability of that reporter—and of others faced with similar demands by their sources—to keep the public informed. On controversial issues, reporting is likely to be forced into imbalance if one side does not trust the media enough to provide information on its activities or beliefs. Without such knowledge about all aspects of society, voters become less able to govern themselves rationally. (2)

This broader perspective throws into sharp relief the ultimate dangers of governmental compulsion of newsmen's testimony affecting their ability to keep confidences.

". . . If the government has the power, at will, to learn the identity of newsmen's informants, or to force reporters to disclose knowledge they have promised to withhold, it has the power to shut off embarrassing or controversial news at its source. This may not be censorship as it is strictly defined, but the result is identical. (3)

I am aware, of course, that when newsmen attest to the shutting off or "clamming up" of sources under the fear of subpoena-compelled disclosure, their testimony is sometimes detracted as self-serving, or viewed as the media's party line designed to obtain favorable legislative action on a "newsman's privilege." In my judgment and experience, the detractors are quite wrong. For I have seen experienced and realistic journalists assume the gravest personal risks in order to protect their confidential sources, in situations where neither their sincerity nor their judgment could be subject to the slightest doubt.

Time and again, I have said to a newsman: "Look, it would be much better if you could comply with the subpoena, or give the government the information that it wants, without making a fuss in this particular case. Maybe you have a legal leg to stand on to resist disclosure, but your chances in court are not very good. Besides, I don't have the time to handle your case in court; I don't know any lawyer in your area who would handle it for free; and a good paid lawyer is going to cost you a lot of money, win or lose."

"Remember that, once you make a public issue of the matter, you are stuck with your position to the bitter end. You would do better to give in quietly now than to make a legal fight and, when you lose, capitulate under threat of jail. Remember also that, to raise the legal issue, you have to be held in contempt and then appeal; that bail pending appeal is almost impossible to secure in contempt cases; so, once again, win or lose, you will probably do some time in jail. I don't know what your image of a jail is, but you are no muscle-man, and these stories about homosexual attacks and beatings of prisoners by other prisoners are not just talk."

And time and again, the newsman has said to me: "Believe me, I'd like to get the government off my back, but I can't. It's not particularly a matter of principle, and the last thing I want is to go down to glory in a test case. But these are confidential sources, and, if I complied with a subpoena, they would never talk to me again. Neither would my other sources. I'd be ruined. This is my beat; I know the people; they trust me; they give me straight stuff; but all that would end if I talked to the government. I might as well just quit and go over to reporting the horse-racing results. It's either that or make a fight of it and take jail if I have to."

These responses to the plain dangers of a term in jail were no party line. They were made by newsmen who were not kidding me or themselves. They had no public posture, and no desire to take one. To the contrary, they desperately wished to slip quietly out of the corner they were in. But they were fighting for their professional lives. For they knew that they could not function as reporters without the ability to give and honor confidences; and they knew that any compelled disclosure which impaired those confidences would destroy sources of information absolutely vital to their work.

I have also seen the threat of disclosure working at an earlier stage. For example, early in 1970, an A.B.C. camera crew was dispatched from New York City to the West Coast to do a documentary on the Black Panther Party. On February 2, Earl Caldwell was subpoenaed by a San Francisco federal grand jury investigating the Panthers. The next day, Black Panther Party representatives, mentioning the *Caldwell* subpoena, asked A.B.C. for assurances that any government subpoena of the outtakes of the documentary would be fought "to the highest court possible." A.B.C. declined to give assurances and the Panthers declined to cooperate with A.B.C. Subsequently the Oakland Black Caucus took the same position; and the A.B.C. crew, "cut off from the entire black community in the East Bay," (4) returned to New York unable to make the documentary.

In numerous other cases, newsmen have called me to inquire what assurances of confidentiality they could give to sources who had asked for such assurances. When I said that, because of the current state of the law, no real promises to protect the source could be made, sources refused to talk and newsmen—and the public—lost their stories. Also, I have advised clients who wished to give confidential interviews to newsmen that they could not safely give them, and again important stories were lost. I could multiply examples, (5) some of whose details are more dramatic than the case of the A.B.C. documentary. Ironically, the attorney-client privilege does not allow me to go into those details. (6)

I do want to make three closing points on the subject of confidential sources:

First, the problems in this area do not relate exclusively to the identity of newsmen's informants. Frequently, the source's identity is publicly known; what is sought to be discovered by compulsory process is the content of his communication to the newsman. This may be the case, for instance, where the newsman has quoted the source by name in a publication, and a subpoena issues for the newsman's notes or testimony regarding other, unpublished portions of the same communication from the source. Sometimes, too, the form of the communication is critical. In the *Caldwell* case, Earl Caldwell had attributed certain revolutionary pronouncements to a Black Panther Party leader, in a front-page story in *The New York Times*. The statements were made in a private interview, and the Government insisted upon its right to subpoena Mr. Caldwell before a grand jury in order to ask him whether the pronouncements had been made seriously or merely bombastically.

When identity is in question, moreover, the problem is not always the simple one of naming names. Instances have arisen where newsmen received a series of anonymous notes, apparently from witnesses or perpetrators of crimes. Law enforcement agencies demanded the notes in order to inspect them for fingerprints or typographical clues that might lead to their sources. I think you will appreciate that, in all of these cases, compulsory disclosure of the contents or forms of communication, or of the physical communication itself, would have exactly the same destructive effect upon the newsman's relations with his sources that is involved in the more obvious situation where a newsman is compelled to name his confidential source.

Second, confidential relations come in a wide variety of styles. Very sophisticated sources—government officials, for example—usually make explicit what is said "for publication" or "not for publication" or "for attribution" or "not for attribution" or "on the record" or "off the record." But other sources do not. Particularly where a newsman's relations with his source are close and long-continuing, the two develop a subtle, unspoken set of assumptions concerning what the newsman will and will not publish. Often what is involved is nothing more definite than the source's understanding that the newsman will use his discretion and judgment, informed by their intimate association, to protect the source. And this makes sense, because the newsman frequently will have a more acute perception of the dangers that his source is running than does the source himself. Those dangers may appear only in the light of subsequent events or of facts known to the newsman but not to the source. Nevertheless, if the source is "burned" by compulsory disclosure of what he has told the newsman, subsequent confidential relations between the two will be impossible.

Third, some confidential relations will be seriously impaired by the compulsion of a newsman's evidence relating to matters that are not, in and of themselves, confidential. This is particularly true in polarized situations—ranging from political campaigns to labor disputes to the activities of "militant" groups—where only the strictest neutrality can keep the newsman's lines of communication open to one or both of two contending forces. Neutrality, in this context, is the newsman's great instrument for obtaining views and facts from both sides of a controversy. If he responds to a subpoena in a legal matter or investigation related to the controversy, that neutrality is lost. Consider, for example, the situation of a reporter subpoenaed, in a prosecution of a militant spokesman, to authenticate a statement made by the spokesman and published by the newsman. Publication is one thing; prosecution is another; and you may be absolutely sure that, once the newsman is forced out of his impartial role and made to play the prosecutor's part, his ability to learn and to inform the public about militant activities will be utterly destroyed.

2. *Independence of the press*

The matter of neutrality, of course, has implications that transcend the problem of confidential sources. Neutrality is but one aspect of the independence of the press. An independent press is a concept—a symbol—of incalculable value in a free society. But it is also a practical condition, and a necessary condition if newsmen are to do their job of keeping the public informed concerning all of the events and ideas that a self-governing people needs to know.

Function individually and collectively, newsmen constitute a vast investigative and broadcasting apparatus. This is an apparatus which is, and should be, devoted exclusively to a single job: the gathering and disseminating of news to the public. In a complex society, that job is difficult enough to do well under any circumstances. To the extent that the news-gathering and news-disseminating apparatus of the press is diverted from its job and made to do others, it is disabled from doing its own vital work.

The disability affects every stage of press operations. At the intake stage, it arises from the fact that, when the investigatave mechanisms of the press are co-opted to the functions of other investigative agencies, they take on all of the burdens and handicaps of those additional funcitons. Let me give you a simple example. Many citizens will talk to a newsman, but not to a lawyer or a policeman, because they "don't want to get involved." But when the newsman is used by a lawyer or by the police to get back to the citizen—when, because of what he has told a newsman, the citizen finds himself "involved"—he is no more willing to talk to a newsman than to a "mouthpiece" or a "cop." The impression is rife in this country today that it is dangerous to talk to reporters. And experienced newsmen [illegible] me—quite apart from any consideration of confidentiality—that it is getting harder and harder for reporters to dig out the news.

The problem is complicated by the welter of conflicts and allegiances that exist in the country. It must not be forgotten that lawsuits and investigations are usually adversary, partisan affairs. To pull a reporter into such affairs is inevitably to portray him as allied with one side of a controversy. The result is that all those who ally with the other side distrust him and will not cooperate in his efforts to get a balanced picture of events.

Similar forces operate at the dissemination stage. In order for the public to make informed judgments on events and ideas of public importance, it is not enough that the relevant facts and opinions be broadcast to them by the press. It is also necessary that the public trust the press—that they have confidence in the credibility, impartiality and balance of the press. In large part, the credibility of the press depends upon its independence, and is jeopardized when pressmen are hauled into the partisan arena of trials and investigations. Indeed, once subpoenaed, a newsman is damned if he does and damned if he doesn't. If he complies with the subpoena, he is seen as a tool of the party whose case is built with his testimony. If he refuses to comply, he is seen as a tool of the opposing party. For every reader who would have viewed Earl Caldwell as a police spy if he had testified against the Black Panthers, there is another reader who now views him as a Panther because he went to the Supreme Court to defend his right not to testify.

Within news media themselves, the effect of "making reporters over into government investigators" (to use the phrase I have often heard from newsmen) is bitterly divisive. I know reporters who will not give certain items of information to their editors because, as they say, "I would go to jail to resist a subpoena but he wouldn't." When a reporter is subpoenaed, or threatened with a subpoena, it is not uncommon for the newsmen in his organization to split sharply on the question whether he should follow the American Newspaper Guild's Code of Ethics (7) or the orders of the court. Working relationships have been badly damaged in the ensuing quarrels. Worse still, I know reporters who admit confusion concerning their own roles once they know they are subject to subpoena. One of them told me that, while he was gathering the news, he habitually found himself worrying more about the potentially incriminating character of facts than their newsworthiness.

None of this, obviously, makes for a healthy and vigorous press. Taken all together, it can cripple the complicated and delicate mechanisms which must move with lightning rapidity and fine precision in order to provide the public with timely and reliable information.

3. The burden of subpoenas

Whenever newsmen appear in court or before an investigative body in response to a subpoena—whether to obey the subpoena or to fight it—considerable costs are entailed. The time which the newsman loses from his work is likely to be greater than appears at first blush. I do not have to tell you about the state of court calendars which almost invariably require any subpoenaed witness to sit around for hours before he is called to the stand, and too frequently require him to appear futilely day after day while the case is continued. I know of instances where reporters planning to fight subpoenas had to attend court every morning for a week in order to witness the expectable continuances, meanwhile spending every afternoon with their attorneys to prepare for the upcoming legal battle—until, at last, the case was ended by a guilty plea and they were excused from attendance.

In addition, these reporters customarily agonize with themselves and debate with their employers and colleagues throughout the time that the subpoena, or legal proceedings challenging it, are pending. Reporters have been debilitated during periods of months by this all-consuming process. To fight, to submit, to go to jail: the choices are not easy, and the turmoil of decisions is exhausting. And, of course, the reporter may eventually decide to go to jail—under a civil contempt commitment whose duration is as long as the tenacity of the committing judge.

Next there is the matter of legal fees if the subpoena is to be fought. I should mention at this point the confusion wrought by the Supreme Court's four-to-four-to-one decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). In that case (which included the *Caldwell* litigation, together with two others) four Justices held essentially that there was no First Amendment protection for subpoenaed newsmen; four held that there was; and Mr. Justice Powell (while technically concurring in a Court opinion) thought that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony . . . on a case-by-case basis." (408 U.S., at 710.) The upshot in the lower courts, of course, has been to leave newsmen almost totally unprotected by the First Amendment; and I myself would guess that, if and when the Supreme Court hears further cases "on a case-by-case basis," it will generally or invariably hold that newsmen must testify. But, as a careful lawyer asked by a reporter "Do I have any legal ground at all to fight this subpoena," I must answer: "Yes, you have some legal ground—although a very slim one—if you take the case all the way to the Supreme Court."

Taking cases all the way to the Supreme Court costs a lot of money. It costs more money than most reporters have; and, even if the bill is footed by a reporter's employer, the cost burden is likely to be very heavy. For the employers who have the most money to defend their reporters also have the most reporters to defend.

4. Self-censorship

The importance of the time and cost factors just mentioned lies not only in themselves, but in their effects upon the performance of reporters, editors and news media management. The same is true, as well, of the dangers to confidential sources and the independence of the press, described earlier. Cumulatively, these several burdens and dangers create a pressure for self-censorship that it would require superhuman newsmen to resist.

Picture an editor rewriting a story that includes excerpts from interviews with employees of a government department. Along with charges of mismanagement and inefficiency, the interviews contain some evidence of graft. But the graft seems to be slight compared with the mismanagement; at most, the charges of graft would be a secondary detail in the finished story; and the editor must exercise fine judgment in the inclusion or exclusion of secondary details as well as in determining the over-all length of the story. If he includes the details concerning graft, he runs a very strong risk of bringing a subpoena down on his head. When the subpoena comes, it will entail lawyers' fees, lost reporters' time, serious inner-office friction, damage to confidential sources, and perhaps a knock-down drag-out court fight against the government which will alienate at least a few advertisers who believe that newspapers should not "obstruct" governmental investigations.

Will the detail appear in the published story? Notice that I have tried to put the self-censorship problem in the context in which it realistically arises. I do not frankly think that many responsible editors would suppress a major news item out of fear of a subpoena. But details are quite another thing; into the editing of details, enormous discretion necessarily enters; and an editor would not be required to betray his professional principles, or even to admit to himself the basis for his actions, if he decided close editorial questions on the side of caution.

Now—and here is the real self-censorship danger, I believe—imagine the subtle editorial processes in thousands of news offices across this country, day-in-day-out, twenty-four hours a day, affected by the kinds of calculations I have just described. Will the quality of the news, or the public's right to know, remain unimpaired?

To move from hypothetical cases to real ones, I will tell you that, in fact, I have seen frightening instances of this kind of self-censorship at work. I have seen reporters consciously suppress dangerous details; and I have seen other reporters, in the course of long discussions concerning the possible legal consequences of their reporting a detail, suddenly decide that the detail was not newsworthy after all.

Because I am not a reporter, I do not know whether the details that were suppressed were newsworthy. But I know that the process of decision by which their newsworthiness was decided is not at all the kind of process which I would like to believe typifies the free press that brings me each morning's news.

(B) THE ASSERTED JUSTIFICATIONS FOR COMPULSORY PROCESS DIRECTED TO THE PRESS

On the other side of the ledger, in any fair consideration of the press-subpoena problem, must be arrayed the interests of government and its citizens in compelling newsmen's testimony. Beyond doubt there are such interests, and they cannot be dismissed as insignificant.

In some number of civil and criminal cases, legislative and administrative investigations, newsmen have information that would be useful (and, in a lesser number of instances, absolutely necessary) to the fair and informed decision of the case or conduct of the investigation. Some prosecutions of guilty criminals cannot be maintained, some civil wrongs against individuals cannot be remedied, some social conditions requiring correction cannot be entirely adequately studied, without the evidence that newsmen could provide. How many such cases occur is unknown; but the bigger and better the press, the more of them there will likely be.

We also must appreciate that the resources of investigators and litigants are not limitless and that, indeed, their resources are often woefully inadequate in view of their responsibilities. Legislatures, courts, grand juries, and administrative agencies are charged with momentous, complicated, difficult decisions. The public welfare depends upon those decisions being made properly; and their proper making often depends in turn upon thorough and reliable fact-finding. Since the volume of decisions is enormous and the personnel to aid in making them are scarce, there is a particular utility in simple and convenient methods of commencing and pursuing inquiries into relevants facts—for example, beginning an investigation with a newsman, who is easily identified from his writings as a knowledgeable lead.

To put it simply, then: Vital investigative and adjudicative organs of the government need all the help they can get. And the press, with its own professional, far-reaching, ongoing investigative apparatus, might potentially be extremely helpful.

While I believe that all of this is indisputable, I nevertheless cannot conclude from it that the needs of government and the people for compulsion of newsmen's evidence are as strong as they are sometimes portrayed to be. (8) Several factors must be taken into account in assessing the extent of those needs:

1. Kinds of proceedings in which newsmen's evidence is needed.

For the most part, it would seem that in major legislative and administrative investigations and hearings, newsmen's testimony is at best a convenience, not a necessity. The members of the Subcommittee would certainly be incomparably better judges of that issue than I. Yet it occurs to me that, where the object of an investigation or hearing is the enactment of general legislation or the promulgation of general regulations, the investigating body ordinarily has a wide choice of specific incidents for detailed study. If, for example, the matter on the agenda is welfare reform, I assume that the operation of the welfare system could be studied in any one or more of several hundred cities across the Nation. In this context, the loss of any particular witness's testimony—say a newsman's testimony—would generally not be very troubling, even though he were the only witness knowledgeable about a particular manifestation of the general subject under examination. I doubt there are many subjects on which Congress, for instance, could not inform itself sufficiently to legislate without resort to newsmen.

The case is certainly different where the object of a hearing or investigation is to root out waste or corruption, expose some other particular public evil, explore the causes of a particular disaster, examine the workings of a particular agency or the qualifications of a particular nominee—or in any other inquiry focused upon specific occurrences, institutions, or persons. But in cases of this kind, the publications of a free press may themselves supply much of the needed information and exposure, along with sufficiently definite leads to assist the investigation without the necessity to call any newsman as a witness.

In any event, it would be presumptious of me to make judgments concerning the needs of legislative investigations. I really mean only to ask the question, which the Subcommittee members' own experience will answer, whether those needs include the subpoenaing of journalists.

I also have no adequate basis to assess the general needs—if there are general needs—for newsmen's evidence in administrative adjudications and civil lawsuits. Except for defamation actions, I have seen or heard of very few press subpoenas emanating from these proceedings. Defamation actions pose their own peculiar problems which I shall discuss in Part (F), below. For present purposes, it suffices to say that those problems relate to an extremely narrow and specialized area of the law, and—however they may be resolved—they can hardly justify the assertion of a need for compelling newsmen's testimony generally.

My own primary experience with press subpoenas has been in connection with criminal investigations and trials. I must say that, in these criminal matters, the need to have newsmen's evidence seems to me to vary inversely with the seriousness of the crime. I have to be rather cautious in making judgments about the extent of prosecutorial need for newsmen's evidence because it has been ten years since I was a prosecutor, and my recent involvement in criminal cases has invariably been as counsel for the defendant or for a newsman. But on the basis of some considerable exposure both to press-subpoena cases and to other criminal cases (9) I can make two observations:

First, with the exception of two specific situations having little importance in the present context, (10) newsmen are seldom of any use to either the prosecution or the defense in cases involving serious, hard-core, violent crime. Press subpoenas are very infrequent in investigations of prosecutions of murders, rapes, robberies, burglaries, muggings, and other vicious "street crimes" of this sort. It may be that some exceptional murderers or robbers discuss their offenses with newsmen or are unlucky enough to commit them under the eyes of newsmen; but I think you will agree that common sense, as well as common experience, suggest that such cases are extraordinarily rare if they exist at all.

Second, newsmen are disproportionately frequently used in open-ended investigations of militant political groups and "victimless crimes" or "youth crimes" (marijuana, campus disruption), where the persons under investigation are likely to take reporters into their confidence as a means of reaching out for public acceptance of their goals or their activities. One may hold differing views of the utility of criminal investigations in these settings. But I think it is strongly arguable that the exposure provided by the press makes far greater contributions to the long-range solution of the social problems underlying these area than does the use of the machinery of the criminal law. And I know that, in these areas, the press supplies a last, vulnerable tenuous link between the mainstream of society and some of its most alienated groups—a link whose rupture will only drive those groups completely underground, with incalculable consequences.

2. *The amount of useful evidence that newsmen possess*

If members of the Subcommittee have occasion to read through Professor Blasi's recent monograph on press subpoenas,(11) I think they will come away with the strongly overriding impression that, in the large majority of cases where newsmen's evidence is sought, the newsmen have in fact no very useful evidence to give. That is certainly my own conclusion based upon my personal observation.

Once again I must be cautious here because—coming to these cases from the newsmen's side rather than the prosecutor's or investigator's—I seldom know exactly what the prosecutor is trying to prove or what the investigator is trying to find. On the other hand, neither the prosecutor nor the investigator usually knows what the newsmen knows, and I do. In a frightening number of cases, he knows absolutely nothing that could be of the vaguest, most vagrant use to the prosecution or investigation of anyone for anything.

I have often felt in these cases like a spectator at a farce or tragedy, watching complicated legal machination after machination mounted for the purpose of enforcing or resisting a subpoena which, if it were enforced, would produce (to borrow the punch line from an Archibald MacLeish poem): "nothing, nothing—nothing at all." These exercises in futility would be hilariously funny if they were not both expensive and deeply tragic; expensive in their waste of newsmen's, prosecutors', lawyers', and the courts' time; deeply tragic because reporters' professional lives and the valued right of the public to be informed through a free press are being senselessly crippled for no conceivable purpose.

I repeat that I do not and cannot profess to make a final appraisal of prosecutive or investigative needs from my one-sided perspective. Still, my perspective may at least serve to alert the Subcommittee to the point that prosecutor's and investigator's perspectives are also necessarily one-sided, in the sense that they know what they seek but not what they will find. Claims of prosecutive and investigative "needs" to subpoena reporters should therefore be critically examined to determine in what measure they assert rather the hopes and expectations of the subpoenaing party than the actual utility of information that a subpoena would unearth.

3. *The processes through which decisions to subpoena newsmen are made*

Reasonable minds may differ, I believe, concerning the extent of needs for newsmen's evidence in investigations and judicial or adjudicative proceedings. But one thing is perfectly plain beyond dispute. It is that the procedures by which subpoenas are customarily issued, and the processes by which the decision to issue them are made, are entirely unsuited to determine either (a) the actual needs for subpoenaing a newsmen in any particular case, or (b) the proper balance to be struck between those needs and the harms which issuance of a subpoena may do to freedom of the press and to the public's right to know.

In civil trials and pretrial proceedings (such as depositions), subpoenas are ordinarily issued routinely by a clerk of court, upon request of either party, without any prior screening by a judge. The same is true of criminal trial subpoenas. Grand jury subpoenas are usually issued at the pleasure of the prosecuting attorney who is conducting the grand jury. Legislative and administrative subpoenas commonly issue at the instance of staff personnel.

In short, subpoenaing newsmen is the easiest thing in the world. Anybody old enough to practice law (and some who are not) can do it. There are no brakes on the process, no procedural screens, and no costs of consequence to the subpoenaing party. Even the minor inconvenience of filling out legal forms can largely be avoided, because the forms are pre-prepared in printed or xeroxed multitudes. Just pull out a form, write in the newsman's name on the dotted line, get a distracted official's signature on the soild line, give the thing to a messenger or process-server, and—presto—a newsman is under a legal order, enforceable by contempt, to appear and testify and/or to produce his papers.

It would be remarkable if these easily actuated mechanisms did not spew forth hosts of improvident subpoenas. Historically, press subpoenas have been restrained largely because, prior to the Supreme Court's 1972 decision in the *Branzburg* case, their legal posture under the First Amendment was an open and troublesome question. Prosecutors and investigators frequently forewent subpoenas against journalists expected to resist—and journalists frequently negotiated arrangements for the production of their testimony or papers without resistance—because neither side was confident that it would win if the matter came to a test of legal right in court. But *Branzburg* ended all that. The subpoena-seekers now have a clear field and nothing to lose.

Under these circumstances, the pressures are very heavy today to issue subpoenas where they are merely convenient, not necessary, and without the slightest concern for their damaging effects upon the freedom of the press. Legislative or administrative staff personnel, for example, harried and hurried by the deadlines for putting together the agenda of a first round of hearings, have every incentive to begin with newsmen known by their writings to be knowledgeable concerning the subject of the hearings. So do lawyers in civil cases, who are authorized by modern discovery practice in federal court and all but four or five States to take depositions of anyone who may have any leads to any sorts of admissible evidence.

Starting any investigative process with a newsman is often the easiest and cheapest place to start, because the newsman—particularly one who has previously conducted his own thorough investigation—is (a) easily identifiable without much spadework, (b) comprehensively informed, (c) articulate and well-organized, (d) unusually reliable, (e) likely to keep detailed notes or detailed files, and (f) attentive to the identity of other persons who may know relevant facts, and to the ways of finding them. Even a lawyer reasonably sensitive to the freedom of the press would find a witness with these qualities very tempting to pursue, in a case where his professional obligations to a client required rapid, thorough, low-cost investigative efforts.

The same pressures to commence investigations by compelling the testimony of newsmen are particularly acute and unchecked in the case of grand juries. Very often, the prosecuting attorneys who handle grand jury matters are junior people, a couple of years out of law school, or attorneys who, for one reason or another, have not progressed to the higher-prestige work of prosecuting criminal trials. They are over-burdened, under-assisted by supporting personnel, highly motivated to produce a demonstrable volume of work product, and therefore given to following investigative shortcuts.

In the world of the grand jury, their power is limitless. They have no opposing lawyers to contend with, no judges to overrule them; and they tell the jury when to meet, when to adjourn, when to lunch, and what witnesses to call. This is an atmosphere in which they would be more than human if they could entirely avoid confusing their own convenience with the necessity for a press subpoena. For all of these reasons, their ability to make responsible decisions that would balance investigative "need" against harm to the press is, at the very least, markedly impaired. (12).

None of this is said in criticism of dedicated public servants. In their place, I would act exactly as they do. But it is important that the Subcommittee understand the realities of the processes from which press subpoenas issue, because those realities make two points plain:

First, the volume of press subpoenas now being issued is no reliable indicator of the actual needs of the legal system to compel newsmen's evidence. All too often, these subpoenas are the product of convenience, not necessity. And the routine, unconsidered fashion in which they issue does not even assure that the convenience will be much of a convenience.

Second, whatever needs for newsmen's evidence do exist cannot justify the limitless subpoena power now commonplace, administered by procedures which allow—indeed, guarantee—that press subpoenas will be issued in many, many cases where a need for them has not been responsibly determined and is absent in fact.

4. Killing the goose that laid the golden egg

Particularly where press subpoenas jeopardize confidential source relations, the ultimate answer to claims that they are needed is that they are also self-defeating. The analogy to killing the Golden Goose is too obvious to labor. To the extent that compelling newsmen's testimony causes their sources to dry up, newsmen are not merely deprived of information from those sources for dissemination to the public. They are also rendered useless to adjudicatory and investigating bodies, because they cease to have access to the information that adjudicators and investigators want.

No calculus of the needs for newsmen's evidence can ignore this effect. Examples of the usefulness of such evidence tacitly assume that newsmen have the evidence to give. When the examples are asserted to support a claim for subpoena powers whose exercise will cause newsmen not to have some of that evidence, the argument of need is proportionately weakened.

I make this point advisedly in terms of degrees, not absolutes. Even in a time of rampant press subpoenas, some sources will continue to take the risks of passing confidential information to newsmen, and newsmen will consequently have some information that might be of use to courts and investigating bodies. All I am saying is that the more you allow courts and investigating bodies to get at this information by subpoena, the less and less useful to them it will become. And, at the same time, it will become less and less available to the public in the form of news.

Doubtless you will hear that dire prediction questioned by other witnesses before the Subcommittee. They will say, as Mr. Justice White said in the Branzburg case: "From the beginning of our country the press has operated without . . . protection for press informants, and the press has flourished." (408 U.S., at 698–699.) The contention, as I understand it, is that newsmen now have confidential informants even though their right to keep them confidential has never been protected against compulsory process; ergo, no exemption from compulsory process is necessary to keep the confidences coming. This argument seems to me to be as blind to history as it is to the facts of contemporary life.

In the first place, up until shortly before the *Branzburg* decision, newsmen ordinarily could assure their confidential informants ample, if not absolute, protection against disclosure. The assurance came in part from the newsman's ability to promise, where necessary, that he would go to jail rather than disclose—a promise that was easy enough to make and credible enough to believe at a time when press subpoenas were relatively rare and still more rarely publicized. In part the assurance came, also, from the fact that the threat of compelled disclosure was not much thought about: it was not, as it is today, a subject in the forefront of every informant's mind and an imminent danger which the conscientious reporter was obliged to mention.

Then again, the First Amendment issue was an open one, and neither government nor the press seemed anxious to put it to the test in court. The result, as I have mentioned earlier, was an atmosphere of accommodation in which the possibility of a reporter being hailed into court and forced to talk appeared very remote. On the one hand, prosecutors and investigators avoided the potential hassles of a press subpoena case wherever they could. On the other hand, the press itself played down the issue in order to minimize the harm of its occasional compromises with subpoena process.

For a number of reasons too complicated to develop here, this blissful era ended late in 1969, and it will not soon return. Press-subpoena cases became front page headlines. Reporters and their sources began to worry and to talk about subpoena-compelled disclosures. The Attorney-General of the United States issued a widely-carried press release on the subject in February, 1970. (13) From that date on, headlines, editorials and scuttlebutt made the vulnerability of newsmen's confidential sources a matter of common knowledge.

Still, the pendency of the First Amendment question in the courts served to restrain the issuance of press subpoenas for a time. Lower-court decisions in favor of Earl Caldwell (14) received enough publicity to make prosecutors cautious and newsmen optimistic. Interviewing a large number of reporters in 1971, Professor Blasi recorded the following "impression that emerged with compelling clarity":

"Nothing, in the opinion of every reporter with whom I discussed the matter, would be more damaging to source relationships than a Supreme Court reversal of the Ninth Circuit's *Caldwell* holding. Several newsmen told me that initially they were extremely worried by the subpoena spate of two years ago, but that now their anxieties have greatly subsided as a result of the strong stand taken by the journalism profession and the tentative victories in court. However, a Supreme Court declaration that the first amendment is in no wise abridged by the practice of subpoenaing reporters would, these newsmen assert, set off a wave of anxiety among sources. The publicity and imprimatur that would accompany such a Court holding would, in the opinion of these reporters, create an atmosphere even more uncongenial to source relationships than that which existed two years ago, when the constitutional question remained in doubt." (15)

These predictions proved unsurprisingly accurate. In addition, the Supreme Court's June 29, 1972 reversal of *Caldwell* shattered the constraints on subpoena mechanisms that had existed "when the constitutional question remained in doubt." No longer do prosecutors and investigators hesitate to use press subpoenas lest they find themselves with "a federal case" on their hands. The federal case is over; the subpoena power is unlimited—or so the lower courts now appear to believe—; and press subpoenas have become available without trouble or cost to any deputy district attorney or investigating staff assistant who finds it more convenient to borrow a newsman's investigation than to do his own.

In this setting, the notion that nothing has changed because newsmen "never had a privilege and still don't" is entirely unworldly. We do not know, and will never know, the extent to which the absence of a clear exemption from compulsory process prior to *Branzburg* adversely affected newsmen's ability to gather the news. But the extent to which, after *Branzburg*, the clear absence of an exemption from compulsory process will destroy confidential relationships is perfectly and painfully obvious.

(C) THE SCOPE AND FORM OF THE EXEMPTION FROM COMPULSORY PROCESS THAT SHOULD BE PROVIDED TO THE PRESS

The conclusions that I draw from the preceding two sections are that the harms done by press subpoenas far outweight their benefits, and that Congress should act decisively to curb them in the interest of the public's right to know. I now turn to questions of the scope of the protection that should be afforded. In the present section, I discuss what seem to me to be the three major issues of policy in shaping such protection. The next two sections deal with necessary procedural safeguards and the vital issue of preemption, respectively. In the concluding section, Part (F) below, I return to several matters of detail in connection with the pending Senate bills that I have been privileged to examine.

1. Who should be protected

I have spoken so far of "newsmen," "reporters," and "the press" as though the meanings of those terms were self-evident. To an extent, they are self-evident; and to that extent, the central core of persons requiring congressional protection can be easily described. Certainly the staff reporters and the editors of daily newspapers, the staff writers and editors of periodicals having broad public circulation, the editors, producers, announcers, copy-writers, researchers, interviewers, camera crews of licensed radio and television stations come immediately to mind. But beyond this central core, difficult problems of definition arise.

Without finding differences sufficiently solid to support comfortable distinctions, one can slide readily from daily newspapers to weeklies to monthly periodicals, thence to regular series of pamphlets or irregular journals, series of books, and finally single books or tracts. One can slide from publications of general circulation to special-audience publications, thence to group newsletters and house organs of various sorts. From staff reporters, one can slide to stringers, writers under contract, free-lance writers, and mere bright-eyed hopefuls. From persons whose by-lines are household names, to those who write when the mood moves them, to persons collecting material for an outlined book, to those who expect someday to write a book, the road runs on without clear demarcations. All of these institutions and people contribute in some measure to the great, unending work of informing the public about events and views of moment.

Yet distinctions surely must be drawn short of some of the extremes mentioned in the preceding paragraph. If they are not, a protection originally conceived for obvious "newsmen"—and which (as I shall later indicate) must be strongly drawn to give such newsmen ample freedom to function—comes to mean a virtual end of all compulsory process. Any person may be writing a book, or planning to. Any group of persons, brought together by innocent or criminal designs, may be communicating among themselves. Of course, once any test or definition is formulated, the persons claiming its benefit will have to show that they meet it "in good faith." But it would be a mistake to suppose that "good faith" itself can supply a sufficient definition. The question remains: "good faith" what?

Although many differing approaches to the definitional problem are possible, I prefer those which focus on three characteristics or attributes.

The first is that a person have a function in the gathering, processing or disseminating of news—by which I mean information or views relating to subjects of public interest or concern. I exclude the collectors and disseminators of other sorts of information—employment services, credit bureaus, private investigators, and the like—because they fall outside the scope of a concern for the public's right to be informed.

Second, I would require that the dissemination be a dissemination to the general public. This seems to me to draw about the right line between contributors to public awareness and persons who merely communicate within some closed in-group. By focusing on the "general public" I do not mean to exclude protection of special-interest publications (magazines for auto buffs or movie fans, for instance) or of some kinds of house organs (college newspapers, political party newsletters, Liberty Lobby, the A.C.L.U. News) which, although published by and for the members of a particular organization, are in fact accessible to significant numbers of persons outside the organization. But I do mean to exclude publications that, by the manner and volume of their circulation, are as a practical matter limited to consumption by the members of some particular organization or clique.

In this regard, I think it wise to avoid rigid and artificial tests of generality of dissemination—circulation volume figures, paid circulation, etc.—which would unnecessarily discriminate against publications for small communities, against struggling young publications, and against publications whose manner of circulation or financing does not fit the common molds. Dissemination "to the general public" ought to provide a workable enough test without Procrustean specifications of the amount or method of such dissemination.

Finally, the dissemination should be required to be a regular or periodic dissemination. Once again, I see no need for rigid standards here (such as those demanded for the maintenance of second-class mailing privileges). To the contrary, I see every reason to avoid discriminations unrelated to the congressional purpose of promoting flow of information to the public through all available channels. But some assurance has to be provided that what is involved is in fact a part of that flow. Intention to write a book, an article, a pamphlet—even where the intender has begun to write or where he has previously written or published another book or article or pamphlet on a less than regular basis—appears to me to be an insufficient assurance. Regularity or periodicity of dissemination is both a more relevant and a more objectively ascertainable indicator of participation in the processes by which the public is informed.

2. Should protection extend beyond confidential sources and source relations

In Part (A) of this Statement, I attempted to identify the several distinguishable albeit interrelated harms wreaked upon the press by newsmen's subpoenas. The question now—and it is a central question in the drafting of protective legislation—is how many and which of those harms should Congress undertake to prevent?

I begin by stating explicitly what Part (A) implied: that, in my judgment, by far the greatest evil of press subpoenas is their destructive impact upon confidential source relationships. (See pp. 4–13, *supra.*) Thus I assume that if Congress is going to legislate any protection at all for newsmen, it will first and foremost legislate to protect their confidential sources. Adequate protection of confidential sources requires more, of course, than to prohibit inquiry into their identity (see pp. 10–11, *supra*); it requires more than to forbid the extraction of what they have explicitly told a newsman "not for publication" (see p. 12, *supra*); and it requires that, in some cases, even wholly and patently non-confidential matters be shielded in order to shield confidential ones (see p. 13). Nothing less is ample for the purpose than broadly to proscribe any and all compelled disclosures that would reveal or impair confidential associations, relations, sources or information of any sort in any way.

Beyond this, either or both of two extensions of protection might be made.

The first is to allow the same kind of shield for all sources, whether or not confidential. This extension is justifiable primarily because of the difficulties both of defining and of litigating what is "confidential"—particularly in a world of complicated relationships where the very facts that have to be adduced to establish confidentiality may themselves be confidential. (See p. 12, *supra.*) The extension also commends itself because what is really wrong with impairing confidential sources is not that confidences are impaired but that sources are. While it will not often happen that a non-confidential source would be impaired by compelled disclosure, this may sometimes occur; and, when its occurrence is sufficiently demonstrated, it should be avoided. These arguments make a very strong case, I believe, for extending protection beyond confidential sources to all of a newsman's sources.

A second and broader possible extension would be to protect, in addition to sources, all of the information that a newsman obtains in the line of duty. The justifications for protecting "work product" independently of the impact of its disclosure upon source relations are (1) that the extent of that impact is unduly difficult to ascertain, and (2) that, above and beyond any problem of sources, the harm done by press subpoenas to the independence of the press (pp. 14–17, *supra*), and the costs and burdens which such subpoenas impose upon the press (see pp. 18–20, *supra*), together with their attendant pressures for self-censhorship (see pp. 20–22, *supra*), warrant the prohibition of essentially all press subpoenas. I would go this far myself although I can perfectly well appreciate that many would be reluctant to do so.

Perhaps a middle position regarding protection of work product is possible. Two such middle positions appear to be embodied in several of the pending Senate bills. One (in addition to providing comprehensive protection of sources) would protect work product against investigative subpoenas but not judicial trial subpoenas. The other (in addition to providing comprehensive protection of sources) would protect unpublished work product, but not published work product, against all subpoenas.

If work product is not to be completely protected—as I think it should be—then the first of these two middle positions seems to me to be a very sensible compromise. The ultimate objective, after all, is to strike a proper balance between press freedom and the needs for compulsory process. For reasons I have already described, investigative subpoenas (including grand jury subpoenas and judicial pre-trial subpoenas) threaten markedly greater harm to the press than do judicial trial subpoenas (see pp. 31–36); and the needs for newsmen's evidence in investigations also seem to be less than the needs for such evidence in court trials (see pp. 25–29, *supra*). Accordingly, to disallow press subpoenas in investigative stages and proceedings, while allowing courts to issue trial subpoenas for work product (if, but only if, sources are not thereby impaired) strikes the balance in an acceptable fashion.

I am afraid that I cannot say the same for the second proposed middle position. Drawing the line between published and unpublished work product makes little sense, so far as I can see. All of the reasons for protecting work product at all (press independence, the costs and burdens of subpoenas, self-censorship, see pp. 18–22, *supra*) apply equally to both classes of work product. And, indeed, the published/unpublished line would actually heighten the danger of self-censorship, for obvious reasons.

3. Should the protection be "qualified" or "unqualified"

Much of the debate about the scope of protection to be afforded newsmen commonly centers on the question whether that protection should be "qualified" or "unqualified." Both the emphasis of this question and the labels used to debate it seem to me unfortunate. The emphasis is unfortunate because it distracts attention from other equally important questions (including the two questions just discussed, and the two next to be discussed). The labels—"qualified" and "unqualified"—are unfortunate because qualification is a matter of degree, not of kind.

To say that a man stands for a 100 percent "unqualified" *anything* always makes him sound rigid and unreasonable. Yet often he differs little from the man who would reach the same result in 99 percent of the same cases. In fact, his objectives may be exactly the same as those of the 99 percent man. The difference may be that the "unqualified" position commends itself to him as more workable and efficient than expending a great deal of effort to administer a "qualification" which accounts for the result in only 1 percent of cases.

In any event, the 100 percent "unqualified" man and the 99 percent "qualified" man are an awful lot closer to each other than either of them is to a 30 percent "qualified" man, notwithstanding the labels.

So much for philosophy. The points I am making, obviously, are two. First, you do not have to conclude that in no conceivable case under the sun would compulsion of a newsman's testimony be warranted, in order to exempt him "unqualifiedly" from subpœna. You may merely conclude that the risks and costs of qualifying the exemption—including the very substantial costs of litigating the scope of the "qualification" in many times the number of cases than will eventually be found to fall within that "qualification"—far outweigh the benefits of picking up a little newsmen's evidence in a few cases. Second, much depends on what kind and how big of a "qualification" you are talking about.

Two sets of distinctions seem to me useful in approaching the question of "qualification." The first has to do with what kind of protection is being qualified: specifically, whether we are considering qualifying the "source" protection or the "work product" protection (see pp. 46–50, *supra*). The second concerns the nature of the qualification itself: namely, whether it is a qualification (such as "violent crime cases" or "national security cases") whose applicability will be fairly predictable at the time the reporter receives the information sought to be subpœnaed, or rather a qualification (such as "no alternative source" or "overriding national interest") whose applicability will not ordinarily be so predictable.

I think that attaching any unpredictable qualification to source protection would be highly undesirable. Since the source cannot know, at the time he talks (or chooses not to talk) to a reporter, whether or not the qualification is going to come into play at some future date, the effect of this kind of qualification will likely be very broadly and drastically to stifle the flow of information from sources.

The attachment of relatively predictable qualifications to source protection gives me somewhat less trouble, particularly if they are narrow enough—such as "an imminent danger of foreign aggression" or "an imminent threat to human life." But, on balance, I would reject all of such qualifications that I have heard proposed or have tried to formulate myself. For, the cases in which there seems to be the most need of compulsory process also turn out to be the cases where compulsory process would most likely dry up sources, and the cases where the dissemination of information to the public is also most vitally needed.

Publication through the news media of an imminent threat to human life, for example, will at least allow some steps to be taken (albeit, admittedly, not always the most effective steps) to avert the threat. But if fear of compulsory process stops up the source altogether, there is obviously nothing to prevent the threat from becoming an actuality.

The issue in these cases is not easy, and it is made no easier by the deeply emotional concern that anyone naturally feels when talk turns to matters of human life or foreign aggression. Nevertheless, my own view is that "source" protection is better left unqualified.

Qualification of "work product" protection might be far more acceptable—depending, to be sure, upon the scope of both the qualification and the protection itself. If, for example, the "work product" protection is limited to investigative states and proceedings as opposed to trials (see pp. 49–50, *supra*), then the case for any qualification becomes weaker.

Whether a "work product" qualification is predictable or unpredictable (in the sense in which I have used those terms to make little difference. The question is whether it can be drafted sufficiently narrowly to allow some specific, important need for compulsory process to be met without unduly burdening the press or threatening its independence. I say "specific, important need" advisedly, because the burden of justifying a proposed qualification of the "work product" protection should be placed firmly upon the proponent of that qualification. This is so simply because the administration of *any* qualification entails some costs; and in the present context, part of the costs entailed will have to come out of the resources of the press.

I do want to make one last point before leaving the subject of "qualified" and "unqualified" protection. It is sometimes asserted that "qualified" protection is worse than no protection at all. This argument has been advanced by both protagonists and antagonists of newsmen's protection; it is a way of creating an "either/or" issue which both sides hope that they will win.

The substance of the argument consists in exaggerating the observation that I made a few pages ago; that newsmen's sources will very often be unwilling to run the risks of disclosure under a "qualified" form of protection. As Mr. Justice White put it in the *Branzburg* case: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem." (408 U.S., at 702.) Notice that the argument applies only to unpredictable qualifications of "source" protection. It does not require an "either/or" approach to the entire press-subpoena problem. Either (a) predictable qualifications of "source" protection, or (b) any sorts of qualifications of "work product" protection, may be made without encountering the argument.

As for the quadrant in which the argument has the most clout, let me make my own position absolutely clear. I believe that "source" protection should be unqualified; and I particularly believe that it should not be qualified by unpredictable qualifications. I have not the slightest doubt that "source" protection which is subject to unpredictable qualifications is much, much less effective in preserving press freedom and the public's right to know than is unqualified "source" protection. But I reject as altogether wrong the notion that "source" protection subject to unpredictable qualifications is worse than no protection at all.

For the fact is that any degree of protection which is given newsmen's sources will result in some net gain of information flowing to newsmen and thence to the public. Even a qualified protection will decrease the number of press subponas that are issued, and probably also the visibility of the press-subpoena threat to sources. This is the real lesson to be drawn from the history of the days before *Branzburg* (see pp. 38–40, *supra*), as most experienced working journalists will tell you. What they told Professor Blasi in 1971 exposes the "either/or" argument for the debater's trick it is: "that they would be happy to accede to more qualifications and exceptions in the wording of a privilege if the probability were thereby increased that the Supreme Court would recognize the basic principle of a newsman's privilege." (16)

(D) THE NEED FOR PROCEDURAL SAFEGUARDS TO MAKE THE EXEMPTION EFFECTIVE IN PRACTICE

Throughout this Statement thus far I have assumed—as virtually every discussion of protecting newsmen against subpoena-compelled disclosures assumes—that the basic instrument of protection ought to be an evidentiary "privilege"—that is, a right of refusal to answer questions. Such a right of refusal to answer questions is an excellent starting point for the protection of newsmen. But it is only a starting point. Without more, the protection which it gives is pathetically incomplete.

To demonstrate why this is so, I must refer back to two earlier portions of my Statement. One describes the procedures by which subpoenas are customarily issued. (Pp. 31–36, *supra.*) The other describes the costs and burdens involved in fighting a subpoena once it has been issued. (Pp. 18–22, *supra.*) Let me add a few additional relevant facts, and then examine how the press-subpoena process would operate if Congress provided newsmen nothing more than evidentiary privilege.

The facts are relatively simple. To begin with, many lawyers serve subpoenas upon witnesses only on the eve of trial or of a hearing. Partly this results from the last minute planning that is characteristic of attorneys carrying heavy case-loads. Partly it results from the fact that court calendars are a shambles. Partly the problem is backlogged process-servers. Partly it is inconsiderateness or the belief that witnesses can easily rearrange their schedules to accommodate a court appearance. Whatever the causes, eleventh-hour subpoenas are the rule and not the exception.

This is certainly true of newsmen's subpoenas. The subpoena that commenced the *Caldwell* litigation was served on February 2, returnable February 4. In a case I handled only very recently, criminal trial subpoenas were served on two newsmen at 5:02 p.m., Friday, calling for their appearance in court the following Monday morning. I have seen case after case of this sort.

In the grand jury room, several different things may happen. The newsman, unrepresented and confronted by the prosecutor's questioning, may disclose matters that the Newsman's Protection Act entitled him to withhold. Or he may be asked no questions covered by the Act. Or he may be asked such questions, and may claim his privilege. In any of these three instances, the prosecutor may decide not to pursue the matter further, and may excuse the newsman.

Next the grand jury returns an indictment, with the reporter's name endorsed on it along with the names of other witnesses. (This is not the only way in which it might be known that the reporter appeared before the grand jury, but it is one of them.) What impact will these proceedings have upon the reporter's source relationships? The reporter may, or he may not, have implicated his sources in the grand jury room. But either way, the sources will not know what happened behind those closed doors. All that they will know is that the reporter was subpoenaed, appeared and testified, and apparently satisfied the prosecuting attorney and the grand jury, since he was not charged with contempt. Then the grand jury returned an indictment—perhaps against one of the reporter's sources or someone close to him.

But let us assume that the proceedings do not take this course, which could destroy the reporter's source relations without more. Let us assume that the reporter claims a privilege under the Newsman's Protection Act and the prosecutor decides to challenge the claim.

The reporter is forthwith taken into court before the first available judge. With his lawyer present for the first time, he is asked again and refuses to answer the prosecutor's questions. The attorney is not much better prepared than he was that morning. But the prosecutor represents that the grand jury is being held up awaiting the reporter's evidence, so the judge is not disposed to grant any continuances. It is under these conditions that the newsman's right not to answer questions is litigated.

For one reason or another, the judge rules against the newsman's claim of privilege. I think we must frankly admit that trial judges, confronted with complicated legal issues on the spur of the moment, may err. The chance that they will err is magnified when counsel's presentation is inadequate. The newsman is ordered to answer questions, refuses, and is held in contempt. He thereupon appeals and seeks a stay of the contempt order or bail. Both requests are promptly and predictably denied. Release of recalcitrant witnesses pending a contempt appeal is extraordinarily rare.

The bottom line, then, is that the reporter winds up in jail—at least until an appellate court reaches his case (which it must decide on the same inadequately prepared record made below)—owing his lawyer an attorney's fee to boot, and wondering what this Newsman's Protection Act is all about.

Certainly, some cases may come out far better than this. Some may come out worse. It is the worst that will be most widely publicized and talked about among newsmen.

Except in the case of top-level management, newsmen served with a subpoena would have considerable difficulty getting a lawyer even with abundant time. Most attorneys are not familiar with press-subpoena problems and do not want to get involved in them unless their background-research time, as well as in-court time, is amply compensated. Reporters are not rich men. Add the fact of eve-of-trial subpoenas to this picture, and you will not be surprised to learn that very, very often, on the return date of subpoenas, newsmen have either no lawyers or grossly unprepared lawyers.

On the return date, of course, the subpoenaed newsman must be in court. If this is a trial subpoena, rather than a grand jury subpoena, the case may well be continued (or it may "trail" day-by-day) so that the reporter is given some additional time—but not much—to secure counsel. Whenever the case is reached, however, on the return date or an adjourned date, the judge is anxious to dispose of it. His calendar problems are bad enough without having to reschedule cases on account of the problems of a subpoenaed witness.

If the subpoena is a grand jury subpoena, the reporter will ordinarily be required to testify on the return date. Adjournments are at the will of the prosecutor.

Now, let me suppose that Congress legislates a Newsman's Protection Act, creating an evidentiary privilege. I shall assume that this is a "source" privilege whose applicability turns upon questions of fact and law as to whether the disclosures sought from a newsman would "reveal or impair confidential source relations." If the privilege is qualified, further questions of fact and law will be involved: whether there are "available alternative sources," "overriding national interests," etc.

What happens in the typical press-subpoena case? Take a grand jury case for instance.

A prosecuting attorney procures a grand jury subpoena for a newsman. He does so without prior screening by the court, because none is legally required. He also does so without thinking much about the problems of the press, because he is busy, has his own problems to worry about, and is used to firing off easily-obtainable subpoenas without much thought. To the extent that he concerns himself with the Newsmen's Protection Act, that will be a bridge to cross later. To the extent that he thinks about whether he really needs the newsman, the answer is that he really does not know. He knows what he wants from the newsman, but he cannot know whether the newsman has any of it.

The newsman receives the subpoena three days before its return date and begins to run around looking for a lawyer. He knows few lawyers, and cannot afford to pay a lawyer much. By this time, most lawyers have commitments for the subpoena's return date. Not many lawyers are looking to handle grand jury matters, or cases of any sort in unfamiliar areas of the law on three days' notice. But let us assume that he finds a lawyer.

He and the lawyer appear at the courthouse inadequately prepared on the facts and law. Given the timing problems and other problems involved, adequate preparation would be near impossible. Now the newsman is summoned behind the doors of the grand jury room. His lawyer may not accompany him, because the grand jury is a secret proceeding and witnesses are not permitted to bring lawyers with them. No judge is present. The prosecutor—the only attorney in the room—is in charge.

Civil and criminal trial subpoenas lack some of the peculiar dangers of grand jury subpoenas: that is, those dangers which arise from the closed-door character of the grand jury. All of the other risks and costs that I have just described are, however, equally applicable to trial subpoenas. Trial judges presiding over crowded dockets, with jurors and other subpoenaed witnesses ready to go and waiting, are notably unwilling to allow postponements for the deliberate preparation of litigation when a reluctant newsman-witness balks. Indeed, any postponement may be impossible—as where, for example, the newsman claims his privilege after a criminal trial has begun and jeopardy has attached. Hasty mid-trial hearings on the applicabilty of the privilege are to be expected, with expectable results.

The results will not escape the attention of newsmen or their sources. Some newsmen will go to jail despite a valid claim of privilege. Others will testify to avoid jailing. Under the circumstances, newsmen will hardly be anxious to publish facts that could make them the targets of subpoenas. (17) Sources are hardly like to confide in newsmen with the freedom that it was the purpose of the hypothetical Newsman's Protection Act to bring about.

I think, therefore, that congressional enactment of this sort of statute will not provide ample protection to newsmen. No mere "privilege" law can. Exempting newsmen from the obligation to testify concerning certain matters when they are examined under subpoena is not enough. Something must be done in addition to assure against the improvident issuance of subpoenas in the first place.

The approach that I suggest would be to give newsmen two distinct protections. The first would be a testimonial "privilege"—a right to refuse to answer questions—shaped along the lines that I have sketched in Part (C), *supra*. The second would be a prohibition of the issuance of press subpoenas unless adequate procedural safeguards were observed.

The most essential safeguard is a requirement that the decision to issue a press subpoena be made at a responsible level of authority. In the case of court subpoenas—including grand jury subpoenas and civil deposition subpoenas—that decision should be made by a judge. In the case of legislative and administrative subpoenas, the decision should be made by the legislative committee (or subcommittee) or the administrative agency, not by subordinate investigative staff.

This requirement is necessary to correct the procedures prevalent today, under which press subpoenas issue not only without any effective pre-screening but under conditions that inevitably encourage their over-use. (See pp. 31-36, *supra*.) The requirement would serve as a desirable, much-needed brake upon the facile and improvident issuance of subpoenas against newsmen.

Of course, I do not propose that the ultimate question of the newsman's testimonial privilege be determined at this preliminary stage. The primary determination to be made before issuance of a subpoena ought simply to be whether there is reasonable ground to believe that the newsman has any material, unprivileged evidence to give. But, as a further check against unnecessary press subpoenas, I would also require two additional findings.

First, in order to stop the tempting practice of commencing investigatory fishing expeditions by subpoenaing reporters, I would require a finding that there exists some factual basis for the investigation (or, in the case of court subpoenas, for the claim of the subpoenaing party). Second, I would require a finding that it is in fact necessary to subpoena the newsman because the evidence sought from him (or equivalent evidence) cannot be equally well obtained from non-news sources. These, I might say, were the protections that we sought in the *Caldwell* case and that the Supreme Court, by a five-to-four vote, held that the Constitution alone did not provide.

The findings that I have described should be required to be made on the record, after adequate notice and a fair opportunity to prepare and to be heard have been given to the newsman. Decisions granting or denying press subpoenas should be appealable, and the issuance of the subpoenas should be stayed for a reasonable time to permit appeal.

I cannot too strongly emphasize the necessity for including procedures of this kind in any legislation whose aim is to provide newsmen meaningful protection against press subpoenas. Indeed, I would go so far as to say that the establishment of such procedures is far more important than the question of the precise shape of a newsman's testimonial privilege (see pp. 46–57, *supra*), and more important even than the question *who* should be given the privilege (see pp. 42–46, *supra*). The ultimate objective of the legislation, after all, is not to protect one or another newsman—or even all newsmen—for their own sake. It is to protect the processes of the press, so that the public shall be fully and intelligently informed. To this end, it is necessary to stem the tide of press subpoenas; and that can be done only by requiring they not be issued without observance of reasonable safeguards.

(E) THE NEED FOR CONGRESSIONAL EXTENSION OF THE EXEMPTION AND ITS PROCEDURAL SAFEGUARDS TO STATE COMPULSORY PROCESS

It is also vital that whatever protection Congress concludes to give the press should extend, not merely to federal subpoenas, but to state subpoenas. To restrict only federal compulsory process, while leaving untouched the thousands of state courts, grand juries, investigating bodies, legislative and administrative organs lawfully authorized to issue subpoenas, would provide scant protection to the press or to the public's interest in a free press.

The press-subpoena problem does not have two distinct and independently resolvable components: a federal press-subpoena threat, and a state press-subpoena threat. Rather, the same newsmen are subject at the same time to the same fear that they may be subpoenaed—whether by federal or state compulsory process is indifferent to them. Protecting them against the one without protecting them against the other leaves the fear essentially unrelieved, and makes little sense.

Practically, federal and state compulsory process may usually be issued in connection with the same subjects. Few areas are exclusively in the federal investigative or adjudicatory domain. For even in areas that we ordinarily consider to be primary concerns of the federal government—such as national security—state agencies are often active. Newsmen covering the militant beat have long been accustomed to simultaneous or concerted demands by the F.B.I. and local police departments for the disclosure of information obtained from militant sources.

But all of this is less significant than that state and federal subpoenas have a single, indivisible impact on the press. To look at the press subpoena problem from the perspective of the subpoenas rather than the press is surely to observe it through the wrong end of the spyglass. If corrective legislation is needed at all, it is not because compulsory process—either federal compulsory process or state compulsory process—is in need of regulation. It is because the functioning of newsmen and the news media, and their ability to inform the public, is being gravely impaired by unregulated compulsory process. The reader of *The New York Times* or of *Time Magazine*, the listener or viewer of the A.B.C. or C.B.S. evening news, may have his fund of information impoverished, his horizons confined, as much by one subpoena as another. Where the subpoena is fired from is not Congress's concern, but what it strikes and destroys.

In this setting, neither the appropriate considerations of federalism nor the Constitution preclude Congress from restricting state compulsory process. The problem is a national one. The Times reader or the A.B.C. viewer may be in New York or Dallas or Chicago, San Francisco or Seattle. Congress seeks to protect his right—the right of all readers and viewers— to be informed. Anything that impinges on this right is a fit subject for congressional action. Both the Commerce Clause and the First Amendment make it so.

1. The Commerce Clause

I take it to be axiomatic that under the Commerce Clause, (18) Congress has plenary power (19) to protect interstate commerce from any burdens or obstructions that may impede it. (20) As Chief Justice Hughes declared:

"The fundamental principal [of the Commerce Clause] is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*Mobile County v. Kimball*, 102 U.S. 691, 696, 697); 'to foster, protect, control and restrain.' *Second Employer's Liability Cases, supra*, p. 47. . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' *Second Employees' Liability Cases*, p. 51; *Schechter Corp. v. United States, supra*." (21)

It is equally plain that the interstate transmission or dissemination of news to the public is interstate commerce. (22) "Commerce," in Chief Justice Marshall's phrase, "is intercourse." (23) Interstate commerce includes "trade, traffic, commerce, transportation or communication among the several States." (24) It is upon these premises that Congress has acted extensively to regulate interstate wire and wireless communications under the Federal Communications Act, (25) and that the Supreme Court has explicitly held that trade in news is interstate commerce. (26).

Obviously, most of the news that most of us read, hear and view has in fact traveled in interstate commerce. I am not referring merely to the dissemination of publications—the vast physical shipments of newspapers and periodicals through the mails and by plane and train across the Nation—the transmission of oral and visual communications through federally-licensed channels at all hours of the day and night. More important, I am referring to the far-flung intake processes of the Nation's news mill. One has only to pick up any newspaper and read the datelines of the items from page to page in order to appreciate the extensiveness of those processes.

As a matter of fact, through the agency of the A.P., the U.P.I., and the dozens of other news services, (27) even the smallest local news story published by the smallest local newspaper may flow into interstate commerce. Listen to the next-to-final news item on every evening's news broadcast: the funny story—the newsworld calls them "brights"—about what happened to Mrs. Jones's dog in Readesville, Maine. If the Subcommittee has any doubts on this score, I suggest that an inquiry directed to any working reporter or representative of the news services during these hearings will dispel it. What the newsman will tell you goes something like this (as related by a reporter for a metropolitan daily):

"The general circulation metropolitan newspaper is the chief news-gathering source for virtually all other news agencies. When I write a story . . . a carbon copy is left on the AP spike. Another goes to UPI. At the two bureaus in the Fox Plaza, my story is perhaps given to a rewriteman who may or may not check the facts further. The story then moves to the radio wire, the state wire, and, perhaps, the national wire.

"That's how the Richmond Independent knows that a Richmond man has just been convicted in federal court. That's how a classical music station can report, in its five minutes of rip-and-read news every hour, that another conscientious objector has just gotten five years at Terminal Island. That's how the Berkeley Tribe discovers that the Establishment has struck again. That's how Time magazine learns that the son of a prominent New England minister has just been sentenced." (28).

Upon these fact, Congressional power to restrict state compulsory process which may damp the flow of news (29) cannot be doubted. That the subpoenas issue from local courts and under state authority is immaterial. Purely local activities that potentially affect interstate commerce have long been held to be within the reach of the Commerce Clause; (30) and state authority cannot nullify Congress's supreme authority (31) where interstate commerce is concerned. (32).

2. *The First Amendment*

The plain power of Congress to restrict state-issued press subpoenas under the Commerce Clause makes resort to the First Amendment legally and logically unnecessary. Nevertheless, alternative reliance upon the Amendment would be solidly grounded as a matter of constitutional law and seems appropriate for important symbolic reasons. The First Amendment embodies this Nation's commitment to freedom of the press as a necessary instrument of popular self-government in a democracy. Its principal congressional proponent, James Madison, (33) wrote that the Amendment secures "that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."(34)

Madison conceived the freedom of the press as enabling journalists to make the kind of uninhibited "investigation" into public affairs that would inform the people of this country for the work of government.(35) He therefore considered that press freedom included the freedom to collect as well as to disseminate the news.(36) If Congress has the power to enforce the First Amendment by appropriate legislation, then, it surely has the power to remove impediments to the information-gathering functions of the press.

Power to enforce the First Amendment as against state compulsory process derives from section 5 of the Fourteenth. For we may "assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states". (37) And by section 5. ". . . Congress is authorized to *enforce* the prohibitions [of the Fourteenth Amendment] by appropriate legislation":

"Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the states, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of State sovereignty."(38)

Because press subpoenas issued under state authority trammel the news-gathering and news-disseminating operations of the press (see pp. 3–22, *supra*), Congress can regulate them. In saying this, I do not ignore the Supreme Court's holding in the *Branzburg* case (39) that the unassisted First Amendment does not prohibit such subpoenas. *Branzburg* does not define the power of Congress, for several reasons:

First, a careful reading of Mr. Justice White's majority opinion in *Branzburg* discloses that that decision does not rest upon determinations either (a) that news-gathering is unprotected by the First Amendment, or (b) that press subpoenas do not inhibit news-gathering. Indeed, Justice White expressly rejects both of these propositions. (40) What he holds is simply that "[o]n the records now before us, we perceive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."(41) If Congress, upon the fuller record made in these and other hearings, reaches a contrary factual conclusion, it may also reach a contrary constitutional result. (42)

Second, a significant component of Justice White's reasoning in refusing to sustain the reporters' First Amendment claims in *Branzburg* was unwillingness "to embark the judiciary on a long and difficult journey to . . . an uncertain destination." (43) In this and succeeding passages, the majority opinion strongly suggests that the Court would be considerably more willing to recognize First Amendment protection of newsmen against compulsory process, were it not for the difficulties involved in defining the scope of that protection by the inescapable judicial method of gradual inclusion and exclusion, guided by nothing more than the general language of the Amendment itself. (44) Congressional legislation providing protection of defined scope would obviate this problem, and so promote the sort of "ordered dialogue between Court and Congress on the detailed application of constitutional doctrine" (45) which section 5 of the Fourteenth Amendment wisely anticipates. In a similar situation, Justice White has appeared to imply that Congressional definition could appropriately deliniate an area for the application of the First Amendment where, without assistance from Congress, the Amendment would not apply. (46)

Third, Mr. Justice Powell's concurrence was necessary to the five-to-four majority that decided *Branzburg*. But, as I have mentioned earlier, (47) Justice Powell carefully refrained from announcing any general rule that newsmen were or were not exempted by the First Amendment from the obligation to respond to state-issued compulsory process. He—and, perforce, the Court—left the subject to be determined "on a case-by-case basis." (48) But Congress could conclude that case-by-case adjudication in this area would be inadequate to protect the First

Amendment interests whose existence such adjudication implies, (49) and, upon that basis, enact a broader, more effective set of safeguards to enforce the Amendment. (50).

(F) THE RELATIVE EFFECTIVENESS OF THE SEVERAL PENDING SENATE BILLS TO PROVIDE NEEDED PROTECTION OF THE PRESS

In preparing this statement, I have had the opportunity to study the following Senate bills: S.J. Res. 8, S. 36, S. 158, S. 318, S. 451, S. 637, S. 750 and S. 870. Among these, the one that comes closest to the approach I would take is S. 870. I shall therefore focus upon S. 870 in this concluding section, and discuss the other bills briefly in relation to S. 870.

1. Coverage

S. 870 protects a "newsman," defined in section 7(a) as any person "who is or was at the time of his exposure to the information sought by subpoena . . . engaged in a course of activity whose primary purpose was gathering, [processing] . . . or disseminating of news through any news medium." Section 7(c) defines "news" as "any communication of information or opinion relating to events, situations or ideas of public concern or public interest or which affect the public welfare." Section 7(b) defines "news medium" as "any newspaper, magazine, radio, or television broadcast or other medium of communication by which information is disseminated on a regular or periodic basis to the general public."

On the assumption that "general public" is used here as I have used it at pp. 45–46, *supra*, these definitions provide coverage virtually identical to that which I suggested at pp. 42–46, *supra*. For the reasons stated in those pages, I prefer the coverage of S. 870 to the somewhat narrower coverage of S. 318 and S. 750 (which use criteria such as paid general circulation and second-class mail status) and of S. 36 (which enumerates an exclusive list of communications media), and also to the broader coverage of S. 158, S. 637, S. 451, and S.J. Res. 8 (which omit the requirement of regular or periodic dissemination).

I believe that S. 870, as presently written, is intended and would probably be construed to include the news services within the definition of "news medium," even though they disseminate news "to the general public" indirectly rather than directly. I might be preferable to include the services explicitly, however. This could be done by adding the words "or to any other news medium" at the end of section 7(b).

I also believe that section 7(b) is not intended and would not be construed to include government public-relations personnel within the definition of "news medium." Again it might be preferable to make this point explicit. Congress has previously dealt with the issue of disclosure by government agencies in the Freedom of Information Act (5 U.S.C. § 552).

2. Form of the exemption

Section 2 of S. 870 exempts newsmen from compulsion to disclose anything that would "reveal or impair confidential associations, relations, sources or confidential informataion." Thus it provides only confidential-source protection, not full source protection or "work product" protection, as I have used those concepts at pp. 46–50, *supra*. However, the effect of sections 3 and 5 of S. 870 is to forbid all investigative press subpoenas, with the result that full source protection and "work product" protection are provided in investigations but not in court trials. As I have indicated at pp. 49–50, *supra*, this seems to me a satisfactory middle-of-the-road position if Congress is unwilling to go further and to offer comprehensive source and "work product" protection as intended by S.J. Res. 8 ("any information or the source of any information procured for publication or broadcast"), S. 36 ("any information or communication or the source of any information or communication received, obtained, or procured" in a journalistic capacity), and S. 451 (any "information or the sources of any . . . information" intended for publication or broadcast).

If Congress approves the principle of this broader protection, it might be provided by amending section 2 of S. 870 to read:

> No newsman shall be compelled pursuant to subpoena issued under the authority of the United States or of any State or Territory to give any testimony or to produce any document, paper, recording, film, object or thing that would: (a) reveal information; or (b) reveal or impair associations, relations or sources of information, received, developed or maintained by him or by any other newsman in the course of gathering, compiling, composing, reviewing, editing, publishing or disseminating news through any news medium.

I would prefer this latter formulation to those in S.J. Res. 8, S. 36, and S. 451, for several reasons. First, it recognizes that sources may be impaired in other ways than by disclosing them (See pp. 10–13, *supra*) and it protects them against either disclosure or impairment. This is particularly important in view of judicial decisions narrowly construing state "shield" laws which create a privilege against the "disclosure" of "sources." Some state courts have construed "source" in this context to mean only a person who confides in a newsman, not a letter, photograph or other object given by that person to the newsman. Since the letter, for example, is not a "source," it is required to be disclosed even though its disclosure may impair the "source" (i.e., the sender). Second, if "work product" protection is to be given, it should include not only what the newsman "procures" or "receives" but also what he "develops."

S. 158, S. 318, S. 637, and S. 750 provide full source protection, but they draw the line of "work product" protection between published and unpublished materials. For the reasons stated at p. 50, *supra*, the latter approach seems to me to be less desirable than the approach presently embodied in S. 870.

3. Qualification of the exemption

Section 2 of S. 870 creates what is ordinarily called an "unqualified privilege." So do S.J. Res. 8, S. 158, and S. 451. Two other bills, S. 36 and S. 318, create an unqualified privilege in investigative proceedings but a qualified privilege in court proceedings. S. 637 and S. 750 create qualified privileges.

For the reasons set forth at pp. 51–57, *supra*, I believe strongly that an unqualified privilege is preferable to a qualified privilege. I would not be so adverse to the kind of tightly-drafted qualification found in S. 637 ("imminent danger of foreign aggression, or of threat to human life") if it were applicable only to "work product" protection. But I think that even this qualification of source protection is undesirable.

4. Procedural safeguards

S. 870 is constructed on the model that I described at pp. 57–68, *supra*, which provides both (a) a testimonial privilege, and (b) a prohibition of the issuance of subpoenas without adequate procedural safeguards. Section 2 contains the privilege, in the form described at pp. 79–82, *supra*.

Section 3 prohibits the issuance of compulsory process except in compliance with the requirements of either section 4 or section 5. Section 4 governs court trial subpoenas issued by courts of record, while section 5 governs all other court subpoenas (that is, civil deposition and grand jury subpoenas issued by courts of record, and any subpoena issued by a magistrate's court, mayor's court, justice of the peace, etc.) and investigative subpoenas. Under either section 4 or section 5, a newsman may be subpoenaed upon a finding that the information sought from him is unconnected with his work as a newsman. That is the limit of the subpoena power under section 5. Court trial subpoenas may also be issued under section 4 upon findings that (a) there are reasonable grounds to believe the newsman has unprivileged, material information, (b) there is a factual basis for the claim of the subpoenaing party to which the newsman's information relates, and (c) the same or equivalent information is not available from another source.

All of the findings required by these sections must be made on the record, after notice and hearing. Provision is made for appeal in section 4 cases and for judicial review in section 5 cases. Reasonable stays pending appeal or judicial review are required.

These features of S. 870 seem to me to make it the most effective of the bills I have examined. I have stated at pp. 57–68, *supra*, the reasons why I believe that legislation providing a mere testimonial privilege, without addition of procedural safeguards against the improvident issuance of subpoenas, will not do the job. Among the other pending bills, only S. 637 restricts the initial issuance of press subpoenas.

The approach taken in the latter bill is to forbid press subpoenas in the absence of a court order divesting the newsman of this testimonial privilege. Procedural safeguards are built into the divesting-order proceeding. This is, surely, a workable alternative to the approach of S. 870. However, I prefer S. 870 because it does not require the issue of testimonial privilege to be determined at the pre-subpoena stage. In cases where some, but not all, of a newsman's evidence is privileged, a divesting-order procedure involves the difficulty of defining the scope of allowable examination of a witness before the witness takes the stand.

5. State compulsory process

S. 870 governs state subpoenas as well as federal supoenas. So do S. 158, S. 637, and S. 750. For the reasons set forth at pages 69-71, I believe that coverage of state subpoenas is indispensable to the protection of press freedom and of the public's right to know. I therefore regret that S.J. Res. 8, S. 36, S. 318 and S. 451 are restricted to federal subpoenas.

6. Defamation

Section 6(a) of S. 870 provides that the bill does no. "alter the substantive rights or liabilities of any person under the law of defamation" (emphasis added). This provision does not render the bill's protections inapplicable in defamation cases (as do provisions in S. 318, S. 451 and S. 750) ; it merely makes explicit what I take to be implicit in the bills that are silent on the subject of defamation (S.J. Res. 8, S. 36, S. 158 and S. 637) ; namely, that the substantive law of defamation is not affected by the enactment of the legislation.

The defamation question is not an easy one. But my own view, for the reasons stated in the footnote,(51) is that newsmen's protection should not be relaxed in defamation cases.

I have run through the several pending bills rather rapidly, in order not to lengthen this extended Statement further. Each of them deserves far more consideration than I have given it. My expression of preferences among the bills should not conceal my enthusiasm for them all. I hope that the Subcommittee, the Committee and the Congress will act to realize their vital common goal: to preserve the freedom of the press as the security of a free people.

REFERENCES

1. The Dean of the Yale Law School has noted newsmen's claim that "disclosures are usually made in reliance on a promise that they will be treated as confidential [and] that the failure to protect such disclosures will dry up essential sources of information." These claims are "far more credible for newsmen," he writes, "than they are for other professionals" whose confidential relations have achieved legal recognition in the doctor-patient, attorney-client, or priest-penitent privileges. "In the case of a journalist's privilege, the informant does not risk his health or liberty or fortune or soul by withholding information. He is likely to be moved by baser motives—spite or financial reward—or, on occasion, by a laudable desire to serve the public welfare if it can be done without too much jeopardy. His communication, more than the others, is probably the result of a calculation and more likely to be affected by the risk of exposure. In this instance, compelling the disclosure of a confidential source in one highly publicized case really is likely to restrict the flow of information to the news media. And by doing so, it may well interfere with the freedom of press guaranteed by the First Amendment."

   Abraham S. Goldstein, *Newsmen and Their Confidential Sources*, The New Republic, March 21, 1970, pp. 13, 14.
2. David Gordon, *The Confidences Newsmen Must Keep*, Columbia Journalism Review, November/December 1971, p. 15.
3. Brit Hume, *A Chilling Effect on the Press*, The New York Times Magazine, December 17, 1972, pp. 13, 84.
4. The words are those of Timothy G. Knight, producer of the aborted documentary. They are taken from an affidavit in the record of the *Caldwell* case. Because the matter of the A.B.C. documentary is already in the public domain, I am free to describe it in detail in my testimony.
5. Several appear in the Brit Hume article cited in note 3, *supra*.
6. See note 4, *supra*.
7. Canon 5 of the Guild's Code of Ethics, as set forth in George A. Brandenburg, *Newspaper Guild Adopts Ethics Code*, Editor & Publisher, June 16, 1934, pp. 7, 41, provides: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies, and that the newspaperman's duty to keep confidences shall include those he shared with one employer even after he has changed his employment." This Canon was reaffirmed at the Guild's 1959 Convention in a 213¾ to 204¼ vote which demonstrates at once the broad agreement of newsmen on their need to protect confidential sources and the divisiveness of tactical questions regarding the extent to which that need should be compromised in the face of the superior power

of the law. For the specific question on which the vote was taken, and the arguments advanced on either side, see *Unqualified "Privilege" Is Endorsed by Convention*, The Guild Reporter, July 10, 1959, p. 3. Suffice it to say here that all were agreed on a relatively broad privilege; and that a consideration advanced to support the more limited of two formulations of it was that the "unlimited" formulation would "encourage law-making bodies to draft limited statutes, endangering the laws which in some States now give newsmen the right to keep confidences inviolate."

8. See Beaver, *The Newsman's Code, the Claim of Privilege and Everyman's Right to Evidence*, 47 ORE L. REV. 243 (1968). Lest the Beaver article create the misimpression that the legal literature runs in favor of compelling newsmen's testimony, I should note that most subsequent writings strongly support exempting newsmen from compulsory process in a more or less broad range of situations. See, e.g., Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 NW.U.L. REV. 18 (1969); Note, *Reporters and their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 317 (1970); Comment, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Comment, *The Newsman's Privilege: Protection of Confidential Associations and Private Communications*, 4 J. LAW REFORM 85 (1970); Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 119 (1970). And see the Goldstein article cited in note 1, *supra*.

9. During the past ten years, I have handled a large number of criminal matters coming from all areas of the country, in connection with such organizations as the American Civil Liberties Union and the N.A.A.C.P. Legal Defense Fund. As a consultant for these organizations, I have occasion to review records in a still larger number of criminal cases. And, of course, in my job as a law-school teacher and legal author specializing in criminal law and procedure, I must do a great deal of reading of reported criminal cases.

10. (1) Newsmen are commonly subpoenaed by criminal defense counsel to establish the fact of publication of news stories and editorials upon which the defense relies in support of motions for a change of venue on the grounds of adverse publicity or community hostility. See AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES—II (2d ed. 1971), paras. 255–256. However, I believe we can assume that no restriction of compulsory process against newsmen that this Subcommittee is likely to approve will go so far as to exempt news personnel from being required merely to authenticate the fact (as distinguished from the contents) of their publications, in cases where such authentication would not impair confidential sources. And this limited form of authentication is all that is required on change-of-venue motions.

    (2) Particularly in cases where counsel for indigent defendants are appointed long after the conclusion of police investigation in a case, such defense counsel frequently find newsmen a useful source of leads at the beginning of their own factual investigations. See *id.*, at para. 112. However, most of what newsmen know in these cases can be obtained from either back issues of their publications or broadcast copy, or from interviews without the use or threat of legal process. Newsmen seldom have admissible evidence that would be the subject of a subpoena; and I doubt very much that their willingness to be interviewed depends upon the threat of a subpoena.

11. BLASI (VINCE), PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS (Reporters' Committee on Freedom of the Press, Study Report, 1972). See particularly pp. 203–260.

12. I do not ignore the "*Guidelines for Subpoenas to the News Media*" (Department of Justice Memorandum No. 692, promulgated September 2, 1970), which require federal prosecutors to clear press subpoenas with the Attorney General. Nor do I believe that Executive pleasure, changeable as it so often proves to be, is a substitute for Congressional regulation in a field of plain legislative competence and concern.

13. See, *e.g.*, *The New York Times*, Friday, February 6, 1970, p. 1, col. 7; p. 40, col. 4.

14. *Application of Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970); *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

15. BLASI, *op. cit. supra*, note 11, at 69–70.
16. *Id.*, at 70.
17. See pp. 20–22, *supra*.
18. U.S. CONST., Art. I, § 8, cl. 3.
19. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." (Chief Justice Marshall, in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).) See also *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104 (1946), describing the scope of the Commerce Power as "as broad as the economic needs of the nation." Congressional exercise of the power has been sustained in the regulation of such divergent areas as gambling, *Lottery Case*, 188 U.S. 321 (1903); prostitution, *Hoke* v. *United States*, 227 U.S. 308 (1913); misbranding of drugs, *Weeks* v. *United States*, 245 U.S. 618 (1918); wages and hours, *United States* v. *Darby*, 312 U.S. 100 (1941); crop control, *Wickard* v. *Filburn*, 317 U.S. 111 (1942); fraudulent security transactions, *Securities & Exchange Comm'n* v. *Ralston Purina Co.*, 346 U.S. 119 (1954); professional football, *Radovich* v. *National Football League*, 352 U.S. 445 (1957); deceptive practices in the sale of products, *Federal Trade Comm'n* v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959); racial discrimination, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); and loansharking, *Perez* v. *United States*, 402 U.S. 146 (1971).
20. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196, (1824; *United States* v. *Darby*, 312 U.S. 100, 114–116 (1941).
21. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937).
22. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) explicitly, rejected an interpretation of commerce that would have limited its meaning to "traffic, to buying and selling, or the interchange of commodities." According to Chief Justice Marshall, the term "commerce" is a general one, applicable to many areas. While most Commerce Clause cases have involved business activitiy with direct economic consequences, there is no general requirement that an activity exert economic effects in order to qualify for regulation. For example, the movement of persons between states has long been agreed to be commerce, *Passenger Cases*, 48 U.S. (7 How.) 122 (1849), and it makes no difference whether the transportation is commercial in character. See *e.g.*, *Caminetti* v. *United States*, 242 U.S. 470, 484–486 (1917). See also note 26, *infra*.
23. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824).
24. This is the statutory definition that the Supreme Court approved in *National Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).
25. 47 U.S.C. § 151, *et seq.* See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969).
26. *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 128 (1937); *Associated Press* v. *United States*, 326 U.S. 1, 14 (1945). In the former case, the Court noted that: "This conclusion [that the Associated Press is engaged in interstate commerce] is unaffected by the fact that the petitioner does not sell news and does not operate for profit, or that technically the title to the news remains in the petitioner during interstate transmission. Petitioner being so engaged in interstate commerce, the Congress may adopt appropriate regulations of its activities for the protection and advancement and for the insurance of the safety of such commerce." (301 U.S., at 128–129.)
27. See, *e.g.*, RIVERS, THE MASS MEDIA (1964), 41–51; EMERY, AULT & AGEE, INTRODUCTION TO MASS COMMUNICATIONS (3d ed. 1970), 231–247.
28. Quoted in RIVERS & RUBIN, A REGION'S PRESS (1971), 12.
29. See pp. 3–22, *supra*.
30. *E.g.*, *United States* v. *Darby*, 312 U.S. 100 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).
31. U.S. CONST., Art. VI, cl. 2.
32. Referring to the Tenth Amendment in *United States* v. *Darby*, 312 U.S. 100, 124 (1941), the Court concluded that "[t]he amendment states but a truism that all is retained which has not been surrendered": "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for

the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

33. Madison's role in the adoption of the First Amendment is described in BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787–1800 (1950).
34. [MADISON] THE VIRGINIA REPORT OF 1799–1800, TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798 (1850), 23.
35. Madison wrote "[t]hat the responsibility of officers of government cannot be secured without a free investigation of their conduct and motives" and "[t]hat it is the right and duty of every citizen to make such investigation, and promulgate the results." *Id.*, at 187.
36. "In every state," Madison noted," . . . the press has exerted a freedom in canvassing the merits and measures of public men, of every description . . . ." *Id.*, at 221.
37. *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). Subsequent decisions converted the *Gitlow* assumption into holdings (*e.g.*, *Fiske* v. *Kansas*, 274 U.S. 380 (1927); *Stromberg* v. *California*, 283 U.S. 359 (1931); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937)), so that it it is now commonplace to speak of First Amendment freedoms being secured against the States by the Fourteenth (*e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 72 (1963); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 431–433 (1963)).
38. *Ex parte Virginia*, 100 U.S. 339, 345–346 (1879). The Supreme Court has made clear that section 5 has the same broad reach as the Necessary and Proper Clause of Article I, § 8, cl. 18. *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966). Under either, as Chief Justice Marshall pronounced in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (1819); ". . . Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are consitutional."
39. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).
40. "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." (408 U.S., at 681.) "[A]s we have earlier indicated, news gathering is not without its First Amendment protections . . . ." (408 U.S., at 707.) "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter." (408 U.S., at 693.) "Accepting the fact, however, that an undermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument [that the extent of First Amendment loss outweighs the amount of investigative gain]." (408 U.S., at 695.)
41. 408 U.S., at 690–691.
42. This is clear upon the least expansive reading of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 206–255 (1971); Cox, *Constitutional Adjudications and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 102 (1966).
43. 408 U.S., at 703.
44. "Sooner or later, it would be neecssary to define those categories of newsmen who qualified for the privilege . . ." etc. (408 U.S., at 704.)
45. Burt, *Miranda and Title II: A Morganatic Marriage* [*1969*] SUPREME COURT REV. 81, 134.
46. Justice White was unable to agree with the majority in *Amalgamated Food Employees Union Local 580* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), in part because he found it impossible to "draw a line" between the holding in that case and unacceptable extensions of it. *Id.*, at 339. However, he allowed that his view might be changed by the existence of congressional legislation enacted "to implement and enforce the First Amendment . . ." *Id.*, at 340.
47. Pp. 19–20, *supra*.
48. 408 U.S., at 710.
49. See pp. 57–65, *supra*.

50. The analogy to the literacy-test provisions of the Voting Rights Act of 1965 and the Voting Rights Act Amendments of 1970 is exact. Prior to the Acts, the Court had held that literacy tests were not *per se* violative of the Fourteenth Amendment. *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959). It thus left the constitutionality of their application to be determined on a case-by-case basis. But when Congress saw the inadequacy of this approach and prohibited the use of the tests, the Court sustained Congress. *South Carolina* v. *Katzenbech*, 383 U.S. 301 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

51. I find the defamation issue troubling primarily because of a concern that irresponsible journalists may avoid liability under the operation of *New York Times Co.* v. *Sullivan*, 376, U.S. 254 (1964), if they are permitted to shield their sources and/or "work product." However, to withdraw this shield from irresponsible journalists is also to withdraw it from responsible ones at the drop of a defamation suit. Protection cannot be taken from the one without the other, since the purpose of withdrawing protection is to determine which is which. And I am unable to assume that libel plaintiffs, as a class, will be more responsible than the newsmen whom they sue.

Moreover, the most critical function of a cause of action for defamation, it seems to me, is to give the plaintiff a forum for vindicating his reputation, rather than to give him money damages for a kind of injury that is hardly susceptible of being salved by money. If this is so, then it is far less important whether the defamation plaintiff "wins" his case (in the sense of obtaining final judgment in his favor) than whether he wins a determination in his favor on the issue of untruth—either because untruth is admitted in the answer or because it is established on a trial.

Protecting newsmen against compulsory process will probably not affect the defamation plaintiff's case on the issue of untruth so much as it will obstruct his ability to prove malice. However, this latter obstruction may in turn affect in two ways his capacity to use the defamation action as a forum for vindicating himself. First, it may dissuade or disable him from bringing the action by decreasing the likelihood that he will obtain damages from which to pay his attorneys; and, if he does bring the action, it may leave him bearing the costs. Second, it may result in his being nonsuited for want of evidence of malice prior to the time that he has been able to obtain a verdict on untruth. The latter problem might be solved by special-verdict practice; but the former seems essentially unsolvable.

The ultimate question, for me, is whether these two harms to the defamation plaintiff outweigh the harms of press subpoenas in defamation cases. Recognizing that I do not know as much as I would like to know about the ways in which the various forms of press protections (see pp. 42–68, *supra*) would affect the defamation plaintiff's case in actual practice, I tentatively conclude that the harms of press subpoenas are the greater. Perhaps the case for the contrary conclusion can be made out on the facts, but I have yet to hear it made.

Senator **Ervin**. The subcommittee will stand in recess until next Tuesday at 10 a.m. when we will be in room 1202.

(Whereupon, at 12:35 p.m., the subcommittee was recessed to reconvene at 10 a.m., Tuesday, February 27, 1973.)

NEWSMEN'S PRIVILEGE HEARINGS

TUESDAY, FEBRUARY 27, 1973

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 1202, Dirksen Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin and Thurmond.

Also present: Lawrence M. Baskir, Chief Counsel and Staff Director, and Britt Snider, Counsel.

Senator ERVIN. The subcommittee will come to order.

This morning, the subcommittee will resume its inquiry into the pending newsmen's privilege proposals.

Before we hear from our first witness, I would like to read into the record part of a letter I received last week, which I feel illustrates the situation which we now have between newsmen and their potential sources of information.

The writer is a freelance journalist here in Washington, who writes, and I quote:

> I am an independent freelance journalist, presently working on the investigation of corruption at the Department of Health, Education and Welfare.
>
> Specifically, I am inquiring into what I believe was a conspiracy among a number of federal employees who fraudulently diverted several hundred thousand dollars of government funds to private use.
>
> A few weeks ago, the inquiry was at a point where it was possible to clearly establish the culpability of at least one of the officials involved, but not so easy to prove the criminality of another official who I believe masterminded this conspiracy.
>
> Accordingly, I phoned the one official among whom the largest amount of evidence had been accumulated, and asked him to discuss the involvement of his colleague. He agreed to meet with me in the presence of his attorneys.
>
> At the meeting he indicated he would like to cooperate with me, especially since to do so would mean my story would center more closely on the other official and not himself.
>
> But the attorneys declined to allow their clients to answer my questions. They cited the recent Supreme Court decision providing journalists may be compelled to disclose information received in confidence and to disclose the sources and circumstances by which the information was obtained.
>
> These attorneys may have been honestly trying to protect their clients from making statements which might later have been used against them in the court. They might have had a bona fide apprehension of the possibility of my having been subpoenaed and commanded to testify. Or they may have been using the Supreme Court decision as an excuse to keep their client from talking to me.
>
> But in either case, my efforts at gathering information were frustrated because of the government's policies of denying journalists the right of confidential communications with news sources.

I would suggest to the Subcommittee that this is not an isolated example, that in fact the *Caldwell* decision has become a considerable obstacle to the free flow of information.

In most cases, unlike this one, we would never know what we might have known. Here we have an idea of what we might have known and the fact that it may never fully be made public is frustrating.

Counsel will call the first witness.

Mr. BASKIR. Mr. Chairman, our first witness this morning is the Honorable Dick Clark, junior Senator from Iowa.

Senator ERVIN. Senator, I am delighted to welcome you to the committee and express our deep appreciation for your willingness to appear and give us the benefit of your views in respect to what I consider to be a very serious problem affecting the right of the people of the United States to know what is going on in this country.

STATEMENT OF HON. DICK CLARK, A SENATOR FROM THE STATE OF IOWA

Senator CLARK. Thank you, Mr. Chairman, very much.

It is certainly a privilege and a great pleasure to be here and appear before your subcommittee this morning.

As you know, this is my first year in the Senate and this is the first time I have appeared before any subcommittee as a witness.

Given the importance of this area and given the importance of your work, I don't think I could have found a better place to begin.

Our Bill of Rights guarantees freedom of the press, and for good reason. The gathering and reporting of information about the actions of our public officials is essential to preserve the basic integrity of our political system.

Increasingly, however, our newsmen are being threatened by court decisions and other pressures which restrict their ability to perform this vital function.

Because of this, I wrote last month to the newspaper editors and radio and television news directors in my State, asking them for their assessment of the need for shield legislation and their opinions on the various bills being proposed.

Their replies, which I would like to enter into the record of these proceedings, indicate a deep concern over the problem. They have also shown me that we, as lawmakers, may be faced with a "damned if you do, damned if you don't" situation in trying to correct it.

On the one hand, enacting any form of shield law carries grave risks.

Drake Mabry, assistant managing editor of the *Des Moines Tribune*, summed it up this way:

> I've always felt it somewhat dangerous to put into law any expansion, regardless of how well-meaning, to what has always been considered a basic right, constitutional or otherwise. This always opens up the possibility for later changes, through amendments, that will further weaken and take away these rights, although the original sponsors were trying to protect them.

In other words, here, as in every human endeavor, the major problem is the intentions of those in power, not institutions or laws themselves. And we cannot legislate intentions.

On the other hand, unless we move now to enact new safeguards, we may well see the freedom of the press weakened and perhaps taken away because of the strength of current threats against it.

"If a newsman cannot protect sources, it's a cinch he won't get the facts," so said the editorial writers of Waterloo, Iowa's KWWL television station in a recent editorial, "and that means (the public) won't get them either."

Clearly, there are no easy alternatives before us.

In the last analysis, however, I feel that an absolute shield law is the choice that we must make. Favored by the vast majority of the Iowa newsmen who answered my inquiry, such a law seems to offer the best chance for a meaningful solution to the current situation and the least likelihood of being subverted or perverted in the future.

The fewer the qualifications a shield law carries, the fewer will be the possibilities for the law to be turned into a sword at some later date.

The language of such a law should be as explicit as possible, with definitions and procedures clearly set forth. The law should protect anyone engaged in the gathering of news, whether he or she is a full-time employee or not. It should require hearings on the admissability of information being sought before subpenas can be issued. It should cover state and Federal courts as well as governmental investigative bodies.

Of the bills now under consideration, in my judgment, only Senator Eagleton's S. 870 meets these critieria, and it does so admirably. I would therefore urge its passage.

Mr. Chairman, I would like your permission to submit the statements of Iowa journalists in the hearing record.

Thank you.

Senator ERVIN. I certainly agree with the statement quoted by you from the editorial writers of the Waterloo, Iowa, KWWL television station. "If a newsman cannot protect sources it is a cinch he won't get the facts, and that means the public won't get them either." That is the problem.

I agree with you—any law we have should be very simple and readily understandable. I have been trying ever since the *Caldwell* case to write such a law.

I have made many attempts, and finally I have written one that satisfies me. It may not satisfy anybody else.

The bill recognizes that the news media need protection in two fields: First, they need protection for the confidential sources of information of the news gatherer; and, second, they need protection against being required to produce unpublished information. In my latest bill which has not yet been introduced, I define a newsman as being an individual who is "regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by any means of communication."

Then I define unpublished information as follows:

"Unpublished information means any information received by a newsman while engaged in his occupation which has not been published or broadcast by any means of communication and includes any memorandum, note, manuscript, transcript, picture, negative, recording, tape, or other record whatsoever containing or evidencing such unpublished information which was made or obtained by a newsman while engaged in his occupation."

Now, to protect these two areas, the bill provides in section 3 that a newsman shall not be compelled to disclose to a court, a grand jury, a legislative body, or other investigatory or adjudicative agency of Government which acts under the authority of the United States or any state, the identity of any person who supplies information to him while he is engaged in his occupation if he explicitly or implicitly gives the person supplying the information a contemporaneous assurance that the source of information will not be disclosed by him.

The reason I phrase it this way is to insure that only information given in confidence is protected. Unless the proof of some assurance is required, some judge may construe that you have to bring the informant up. He is the only one who can say he reports confidence in the news gatherer. Instead of writing a bill which would permit this, I say if the newsman gives this assurance, either expressly or impliedly the requirement is met. The newsman would have to be the only one to testify. You wouldn't have to produce the informant to show he did disclose confidential information to the newsman.

Then the other section of the bill provides that neither a newsman nor any other person having custody or control of the same shall be compelled to produce before a court, grand jury, legislative body or other investigatory or adjudicative agency of government which acts under the authority of the United States or any state anything which constitutes unpublished information within the purview of the definition set forth in section 2(e) of this act."

That is the definition I just read.

I provide a very simple way to invoke this privilege. I think a process by which you have to get authority to issue a subpena in advance and have a trial before you can even issue a subpena for a witness is too cumbersome. This bill provides two ways in which either one of these provisions can be invoked. The first way is the newsman can wait until he is called on to testify or to produce the documents and then he can merely enter an oral or written objection. Then the court or the grand jury or the legislative body or the other adjudicative agency must enter such an order as is necessary to protect him from being required to reveal the identity of his informant or to produce the unpublished information.

Now, recognizing that a grand jury is virtually always composed of laymen, and that the witness does not have the right to take his own counsel into a grand jury room with him, it provides when a grand jury renders a decision adverse to the newsman or the person having the custody of the unpublished information, that the newsman or the person having the custody of the unpublished information cannot be required to testify further before the grand jury until he is accorded a review by the judge presiding in the court in which the grand jury sits.

A second way the newsman may object to a subpena to testify or to produce unpublished information in advance of the time for his appearance or the production of the information, is by making a motion before the court in which he is required to appear, or produce the document, or the court in which the grand jury sits or the legislative body or the other investigatory adjudicative agency, that the subpena be quashed, or that the testimony that he is required to make or the documents he is required to produce be limited under appropriate order.

Then it provides that thereupon the court or the legislative body or the other agency shall enter such order or take such steps to make certain that he is not required to disclose his sources of information or to produce unpublished information in violation of the act.

I think that is simple and understandable. It covers the two fields in which there is great injury done to the gathering of news and the people's right to know. I hope when I introduce the bill, you will give consideration to it.

Senator **Clark.** Thank you very much for the explanation, and the opportunity to testify.

Mr. **Baskir.** Mr. Chairman, our next witness is the Honorable Charles H. Percy, the Senator from Illinois.

Senator **Ervin.** Senator Percy, I wish to welcome you to the Subcommittee and express to you our deep appreciation for your willingness to appear and give us the benefit of your views in a field which has caused you much concern and induced you to make much study.

STATEMENT OF HON. CHARLES H. PERCY, A SENATOR FROM THE STATE OF ILLINOIS

Senator **Percy.** Thank you, Mr. Chairman.

I am delighted to be here with you and the members of the staff to express my thoughts on what I consider to be an extremely important issue, the relationship between the Government and the press.

It is a complex and delicate matter, but I feel confident that given the expertise of the chairman and the members of this subcommittee, it can be resolved successfully.

First, let me say that I am neither a sponsor nor a cosponsor of any legislation on this issue. Thus, I am not here to advocate one bill over another.

But I have followed very closely the hearings of the committee and I have found very perplexing and very difficult areas of controversy. I will try to address myself to each of those areas.

I am here because as citizens, we all live under the protections of the Constitution, and especially the first amendment's protection of freedom of the press. Because of the importance of the issue now before this subcommittee, I feel that it is the particular responsibility of those of us in government who hold public office to speak out and take a position. To be silent in this debate, to refuse to express our thoughts on these [illegible] would be a disservice to the public which we serve and to the Constitution which we have sworn to uphold.

Mr. Chairman, there are two particular reasons I feel very strongly about this issue.

In the re[illegible]ection, I spent 5 weeks in Asia and I think the most troublesome aspect of that trip was to visit countries where, presumably, the democratic process has operated but where for one reason or another the Government has seen fit to shut down the press. There is a feeling t[illegible] in those countries of a sterility of life and a suppression of public dialog.

It is the press that keeps the Government honest and on the right track. When you have, as in some countries I have visited, 20 newspapers all saying the same thing, radio and television totally controlled by the Government, you can't help but feel disheartened.

I also feel that the press has played a unique role in my lifetime in Cook County and in the State of Illinois. We have a particular set of problems. I imagine that the credibility of government is at the lowest point today it has been for a long, long time, it has been very low under both Republican and Democratic administrations in Cook County during my lifetime.

We have the experience of an ex-Governor and a Federal judge who has been found guilty of mail fraud, bribery, perjury and income tax evasion. The director of revenue of the State of Illinois has been found guilty of mail fraud, bribery, conspiracy, and income tax evasion. Two Illinois supreme court justices reportedly involved with bank stock left the court because of the scandal involved. We have the Cook County clerk just this week going on trial for a case involving bribes and kickbacks on the purchase of voting machines. And we have what is well-known throughout the country, if not the world, the famous case of the shoe boxes where a fortune was amassed in cash by our secretary of state through apparent frugality in saving his salary. After his death, some $750,000 to $800,000 in cash was found. The role of the press has been absolutely invaluable in each of these cases.

We haven't the checks and balances in government that there should be, and the press has helped to fill the void.

A dozen years ago, I was responsible for setting up and chairing an Operation Watchdog in the Better Government Association.

This unit still carries on some of the most intensive investigative work in the State of Illinois and in Cook County.

We find the leads but we do not have the resources to follow them through. They are turned over to the newspapers, or, if the newspapers get a lead, they will follow through and they get an exclusive on it. That's been working wonderfully well for 12 years now and we have uncovered all kinds of duplicity, fraud, scandal and all types of activity that are a discredit to our Government.

Without the power of the press and the freedom of the press, we would have been hindered in our activities.

I shudder to think what will happen now if we do not have greater protection for our newsmen. I shudder to think what will happen if they feel, and everyone talks with a newsman feels, that everything they discuss would be brought out in open court at some time.

The value of our press lies in its independence. And I believe that the increasing number of subpenas issued to members of the press endangers that independence. It does so because it tends to make the press part of the investigatory apparatus of government. A Government prosecutor who is unwilling or unable to find out what he needs to know to do his job, and who seeks easy information by forcing a newsman to disclose it, is making the press march to Government music.

It is clear to me that once the public begins to regard the newspaper reporter with his notebook or the radio reporter with his tape recorder or the TV cameraman as a potential Government agent—however unwilling—then the public will cease to accept and cooperate with the press.

Last June, as you well know, Mr. Chairman, the Supreme Court ruled in *Branzburg* v. *Hayes* that the first amendment does not give reporters the right to refuse to appear before grand juries. As a consequence, newsmen who are subpenaed must either testify or be willing to go to jail for contempt. This is not the type of protection of the freedom of the press that I feel that the Founding Fathers had in mind.

Fortunately, the Court also invited the Congress to enact shield legislation that would protect newsmen from subpenas, and that is why we are here today.

The first question which we must address is whether there is a need for any congressional action at all on this matter. It seems to me—and evidently most of the witnesses who have appeared before this subcommittee agree—that the initiative indeed rests with Congress. If Congress does not act, then nothing will be done.

I am aware of the fact that the Attorney General has issued guidelines which reflect a policy on the part of the Justice Department not to issue subpenas to newsmen unless it is absolutely necessary. But, governmental guidelines are not the type of protection which make newsmen or their sources feel secure. In fact, I have a feeling that governmental guidelines such as those issued by the Justice Department would have made our Founding Fathers a bit uneasy. After all, our whole system of government is based on a healthy skepticism of governmental promises. If the Founding Fathers had trusted the Government they created to the degree that we are now being asked to trust the Government, then we would have had little need for the Bill of Rights. The plain fact is that those guidelines could be repealed tomorrow morning, or by the next Attorney General, for any one of several inadequate reasons.

Even with guidelines, subpenas have been issued, newsmen have been asked to disclose their sources or produce unpublished information, and newsmen have gone to jail rather than yield to these demands. This has occurred in State courts as well as Federal courts; at the urging of the Government and at the urging of defendants. We are talking about a very real problem which has already had a chilling effect on the free flow of information in this Nation and it could get considerably worse, as we have seen in countries around the world.

We should keep in mind that the action which the Congress is being urged to take is not radical at all. In fact, the protection which the legislation we are discussing would provide is no more than what many scholars thought the first amendment already provided, until the Supreme Court told us otherwise.

The second question I want to discuss concerns whom we are to protect. Certainly we agree that professional newsmen should be given this privilege. Reporters for daily newspapers are unquestionably newsmen. But what about the reporter for the underground newspaper on the college newspaper? What about the pamphleteer who works out of a one-room shop and turns out two pages of printed copy that he hawks on the street corner? Are they to be considered newsmen? Are they performing a function which the Founding Fathers wanted to protect? Or do we want to limit this protection to the elite of the press; those who have lunch at the National Press Club?

I note that some of the bills before this subcommittee limit the protection to those newsmen who seem to have achieved success in their profession, those whose principal vocation is the news business.

If we were to accept a definition of this nature, we would necessarily have to exclude all of those part-time journalists who decided they needed to bring something to the attention of the public only occasionally. We would have to make value judgments as to whom we thought was worthy enough to have the privilege. The Government would then be placed in a position of deciding whom it wanted to protect, and conversely, whom it wanted to leave unprotected. After much consideration, I do not favor such limitations, because they tend to protect only one elite group of reporters, one which is very hard to precisely define, and is much too limited in scope.

Benjamin Franklin, Thomas Paine, and a host of others who are a treasured part of our national heritage did not have their first job with the 18th century equivalent of the *New York Times* or NBC. Yet they are the type of people who would be excluded if we were to define "newsman" too narrowly. If requirements of time spent or money earned are established by legislation, aren't we really saying to aspiring reporters that first you have to show us that people are going to accept what you write, that you are good enough to make a living from your reporting, and then—and only then—will we give you this privilege?

Should we exclude from protection the law professor who writes only one article a year for a limited audience? Is not what he has to say at least as important and worthy of protection as what appears daily in the gossip columns?

Mr. Chairman, it seems to me that we have to consider what is at the heart of the first amendment. The reason we want to keep the press free is to enable the public to get as much information as possible from sources other than the heavily staffed and well funded public relations departments of government agencies and bureaus or a group of journalists who are accepted by the establishment. To my way of thinking, the first amendment also should protect those who tend to get under the skin of government, who make the Government nervous, and it is precisely those people that a bill with limitations on the definition of "newsman" would exclude from protection.

For these reasons, I suggest that this subcommittee adopt language which extends the protection to any person who collects information for the purpose of disseminating it to the public. As an essential part of this approach, the legislation should state the congressional intent very specifically. It is ideas, informations, and the dissemination of both that we want to protect. Anyone who is disseminating either of these to the public should have the benefit of a testimonial privilege. In those marginal cases in which someone might claim the privilege but would not fall within our intent, a court could make a decision on an *ad hoc* basis. In this way, we would be keeping the protection as broad as our intent, without sacrificing some who might not fit under any strict definition.

The next question which must be addressed is whether or not the privilege should be absolute or qualified. I like the distinction made by Senator Weicker between investigative bodies and courts because it helps to focus our attention. I don't believe that grand juries or congressional committees should be able to subpena newsmen on the off-chance that they may know something about a particular crime. The term "fishing expedition" has become a cliche because investigative bodies have used this procedure so often. In my opinion, it is investigative bodies who are most likely to abuse their powers at the expense of others. I have concluded that, to insure the greatest protection to the greatest number, an absolute privilege should be given to newsmen with regard to any investigative board, agency or committee.

The more difficult question is whether to allow this privilege to remain absolute before a court.

This is the area with which I have struggled the most. I do not say this is more difficult because a government prosecutor might be hampered in his investigation. Assuming that he has a competent staff of attorneys and investigators, he should have no serious problems. The question of an absolute privilege before a criminal court concerns me principally because of the potential problems it could mean for the accused individual in a criminal case. It raises the possibility, however remote, that a man who is innocent might not be able to compel favorable testimony from a newsman which might be essential to proving his innocence.

It is in cases such as this that two very important and two very basic rights come into conflict. The first amendment guarantees a free press. The sixth amendment guarantees the right of an accused "to have compulsory process for obtaining witnesses in his favor." Does the gravity and the importance of the first amendment's protection completely negate the sixth amendment's protection in those cases where they conflict?

Mr. Chairman, I have struggled with this question, as I know you and the other members of the subcommittee have, even though I have less of a background than you and the members of the committee. However, whereas, you have indicated your preference for a qualified privilege, I must respectfully disagree. It does not seem to me to be practically possible to draft any legislation which provides adequately for qualifications and which, at the same time, does not set itself up for potential abuse. The difference between a qualification and a loophole is, I would suggest, very small and very vulnerable.

For example, I think that Senator Cranston made a good point when he noted that forcing reporters to testify in cases where there exists an "imminent danger of threat to human life" could result in forced testimony by a reporter investigating diseased meat, or defective automobiles or almost any other product safety issue that could be construed to involve a threat to human life.

I think the danger of such loopholes developing also applies to libel cases, as Senator Mondale and Brit Hume have argued convincingly.

Indeed, it is not mere idle speculation that leads us to worry about qualifications becoming loopholes, for we have some actual experience in the matter. Prof. Benno C. Schmidt, Jr., of Columbia Law School has testified before a House subcommittee that in the 19 States that have shield laws "judges have proved zealously adept at finding loopholes which allow reporters to be held in contempt."

What we seem to fear are situations in which a reporter's notes or out-takes may be the only evidence which can prove an individual did or did not commit a crime. But this argument seems to presume that in such a case, the reporter would refuse to come forward with the necessary evidence. This is an assumption, after talking with many, many members of the press, that I cannot accept.

It is also an assumption unwarranted by actual experience, for, in the States that have shield laws, there is no reported instance of which I am aware in which a miscarriage of justice resulted from a reporter having crucial information which he refused to provide voluntarily.

I will admit my search may not have been totally complete but I assigned my staff to this job and I specifically asked them to look and search and find instances where there might have been a miscarriage of justice. They simply have not been able to find any for me.

By giving newsmen a testimonial privilege, we do not imply that their civic and moral obligations have ceased, any more than we do when we grant such privileges to attorneys, doctors or priests. If a case should arise in which the only hope of the defendant's not being convicted of a serious crime lies in making a reporter divulge his source or unused information—a situation which itself is highly improbable—I cannot believe that a reporter would refuse to cooperate with the defendant. Yet this type of extreme case is the type that seems to have us most worried, even though, as far as I know, no one has never shown us that this has, in fact, ever happened.

Another question which I want to deal with just briefly is that of whether both sources and unpublished information, notes and outtakes, should fall within the protection of the privilege which I have suggested. I don't see any good reason for not treating both sources and unused information in the same fashion. In the absence of protection for unpublished or unbroadcast information, Government officials would be free to peruse reporter's unpublished notes or unused tape recordings and film-material, actions which might jeopardize the sources themselves. And it would inevitably lead to our condoning the unfortunate present practice of Government's second-guessing the choice of material used in stories or broadcasts. Thus, I favor protecting both sources and unpublished or unbroadcast information.

Mr. Chairman, the final point I wish to discuss is the question of whether or not we should pass a preemptive law—one that would apply to states as well as to the Federal Government.

Here again I known this is a field in which you have devoted most of your life and are considered by all of us as an expert.

Again, I known that certain issues of federalism are understandably raised in the minds of many people on this matter. In my mind this is put to rest by the fact that we are trying to buttress the protection afforded by the first amendment. That is a right that applies regardless of political boundaries. And from a practical standpoint, news flows with commerce across State lines. The right of the public to be fully informed should not hinge on whether a particular State legislature has enacted appropriate legislation. This is a right which must be protected by the Congress.

It seems to me that it would be very detrimental to the day-to-day functioning of a free press to tell a reporter who lives in an area in which he frequently crosses State lines that the way he gathers his news depends upon the State in which he happens to be working. For instance, consider a situation in which a reporter for the *New York Times*, himself resident of Connecticut, was covering a story about a government agency located in Washington. Assume that he interviewed an employee of that agency who happened to be resident of Virginia, and that the interview itself took place in Maryland. And, finally, assume that the laws of New York, Connecticut, Washington, Maryland, Virginia, and the Federal Government differed in regard to the protection accorded newsmen and their sources.

Now, I ask this question: Would our attempts here to safeguard the right of the public to know be of any practical value if all we had done was complicate the situation? Do we want our newsmen to carry with them copies of the applicable State statutes as they go about their business? Is it fair to require potential sources to be aware of the different laws on this matter, depending on whether they tell us their story on the east or the west bank of the Potomac River?

Mr. Chairman, very simply, if the privilege does not apply everywhere in this country, then it cannot apply effectively anywhere. There is no doubt in my mind but that the law we enact should be preemptive.

Mr. Chairman, the issue of newsmen's privilege is a very difficult one which is fraught with many fine distinctions. I have considered these issues at some length. I feel that it is my responsibility to share with this subcommittee some of my thoughts on this admittedly difficult question and to outline the type of bill that I think this Congress needs to pass. If my time this morning has helped just to deepen the debate which is now taking place over this issue, then I think that my time has been well spent.

The threats to a free and vigorous press are very real.

Here we have no difference of opinion whatsoever.

Having seen the effects of an intimidated and Government-controlled press at first hand recently, I feel a special sense of urgency in testifying on this matter this morning.

From the personal experience that in working with the investigative press when there were not checks and balances in Government that I want to see no shackles or straitjackets put on them, for I have no doubt but that this country needs an active, probing, enquiring, inquisitive press that never wavers or hesitates because of implicit or explicit government intimidation. That is why Congress must act decisively to give reporters the legal protection that will allow them to operate as freely as possible.

Thank you, Mr. Chairman, very much.

Senator ERVIN. There is an old adage to the effect: "Wise men change their minds and fools never." And about the only thing I can cite right offhand to prove I can make a claim to being a wise man is that I have changed my mind about the scope of a newsman's privilege bill.

I certainly agree with you that it has to cover the whole country.

I think one trouble with so many state shield laws is they are too artificial. They have too many exceptions and the exceptions sometimes eat up the rule, which is a bad situation.

Governor Rockefeller appeared before us the other day and gave a very illuminating statement. He made a suggestion that in passing laws the Congress should not entirely preempt the field. He said that the law should provide that any state law must have at least the minimum requirements of the Federal act, but that if the State law wanted to go beyond the Federal act and make it more effective, it could define some procedure that was more effective in the particular State for the enforcement of the rights. I think perhaps that is a wise suggestion.

Senator PERCY. I would like to comment on that which I noted. I have great respect for Governor Rockefeller.

I have felt that the miracle and genius of the Federal system is that if we make a mistake in a State it is a small one—1, 2, 3, 4, 5 States, not the 50 States. And because of this, we have a laboratory in which to test ideas.

Here we have had a dozen states with absolute shields with no real problem. I base my confidence on the experiences of those 12 diverse states that have provided absolute protection for a long period of time. That is enough evidence for me that an absolute shield will work for the whole country. The protection that I think we need is so great that I would like to see us extend it and go as far as we can.

He certainly has a fallback position if we do enact merely minimum legislation in the field, of course.

Senator ERVIN. The testimony you have given concerning your observations of suppressed or controlled press certainly does prove that our country must have a free press if it is going to have a free society.

Senator PERCY. Absolutely.

Senator ERVIN. And the great purpose, I think, of the first amendment, is to insure that America shall be a free society.

You gave some very fine testimony on the question. One point is undoubtedly true, and that is the fact that our country has been able, by institutions created under our Constitution, to function largely because the function of the press has over the years been to discover and point out inefficiency and corruption in Government. Undoubtedly, more is pointed out by an investigating newsman than is pointed out by any public official. Also we need to protect the sources of information, as you show very well, because if a person is on the inside of some governmental agency and he sees inefficiency or corruption in that agency, he is much more likely to reveal that to the proper authorities for investigation if he is assured of the fact that his identity is not going to be disclosed. After all, a great majority of the people have the problem of making a living for themselves and their families. If a man felt that his job would be jeopardized if his identity was revealed, then he would be less likely to point out corruption and inefficiency in government.

Senator PERCY. Absolutely.

From personal experience, and this goes back many, many years—12 years now in the investigative work we have done in Cook County—I can say that we benefited tremendously from the revelations that were made directly to us and our investigators and newsmen by employees of nursing homes. Federal Government puts $800 million into nursing homes, and many of them are nothing but warehouses for the dying.

The subcommittee under Senator Moss went to Chicago, because the scandals were so great that it warranted a full investigation. The results of the testimony we took that had been given to newspeople by employees of these establishments were so significant that these employees felt that they just had to tell someone about it, but if their jobs were at stake they might not have done it. As a result of that we have clamped down through regulations, we have talked to the President about it, and our whole policy in terms of nursing homes has changed. That is just one of many experiences I have had which indicates the importance of a free press.

I think most of the sources would have dried up if they had felt at any time that the newsman they told their story to would have been required to show his notes to someone and which could have resulted in recriminations being brought against them.

I am particularly delighted, Mr. Chairman, to hear you say you feel this legislation should apply to the states.

Senator **Ervin**. The most recent bill I have drawn, as you pointed out, takes care of the situation you mentioned in respect to libel actions. It provides this privilege would belong to a newsman if he appears before a court or grand jury or legislative body or any other legislative or adjudicative agency of government as a witness in any capacity. It specifies as a witness in obedience to a subpena, as a party to civil or criminal action, or otherwise. In other words, I think, regardless of whether he is actually subpenaed, if he is sued or party to an action that he could exercise this privilege.

With reference to this question of absolute and qualified privilege, I object to some of the proposals that have been made because they really would exempt newsmen from testifying, even to facts that he acquired, not by communication from others, but by the exercise of his own senses. My bill provides, I think, an absolute privilege in the two instances mentioned. But it is limited to two areas of protection, and those are sources of information and unpublished information. I think the effort of the House committee to get the outtakes of CBS in connection with the "Selling of the Pentagon" program and many subpenas issued by the courts for work product illustrate that the prosecuting attorneys have no business getting access to unpublished information. If they have such access, the information in many cases is not going to be collected at all.

As I say, I have this feeling—I am a person who believes in keeping at local level those things related to local concerns—but the Constitution certainly contemplates by the first amendment there shall be a free flow of information in interstate and foreign commerce. For that reason I think that extending the Federal act in this field to the States is justified not only by the first amendment, but also by the interstate and foreign commerce clause.

I thank you very much for a most valuable contribution.

Senator **Percy**. Thank you very much, Mr. Chairman.

Mr. **Baskir**. Mr. Chairman, our next witness is the Honorable John J. O'Hara, president-elect of the National District Attorneys Association, and he is accompanied by Mr. William Cahn, past president of the association.

STATEMENT OF HON. JOHN J. O'HARA, PRESIDENT-ELECT, ACCOMPANIED BY HON. WILLIAM CAHN, PAST PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Mr. O'Hara. I would like to yield to Mr. Cahn because of the time pressure he is under.

Senator Ervin. We want to welcome you both to the committee and express our deep appreciation for your willingness to come and give us the benefit of your views in which your profession has a very substantial interest.

Mr. Cahn. Thank you very much, Senator.

I would like to express my personal appreciation to this august body for making time available to the members of the National District Attorneys Association so that we may convey our views about this most important subject. My testimony, however, must of necessity reflect my own personal thoughts and those of the prosecutors with whom I had personal contact since there was no ample opportunity for our association to adopt a uniform policy or statement of position. Perhaps then it would be fitting and proper for me to introduce myself and give some of my background.

Senator Ervin. If you will pardon the interruption, I doubt I could adopt a uniform policy, because I find that even among those in the news media, there are several different opinions in this field. Some of them don't want any legislation at all. Some of them feel that legislation would be extremely limited, and some think it should be granted absolutely to cover and protect all newsmen from having to testify under any circumstances.

Mr. Cahn. Senator, I am inclined to agree with you not only on this subject but many other subjects.

I am the district attorney of Nassau County, N.Y., and have held this position since 1962. Prior to that, and since 1950, I was an assistant district attorney in the same office. At that time it became my eventual responsibility as chief of the organized crime and homicide bureaus to investigate and prosecute all major homicides and syndicated crime cases. In this position, I worked on an extremely close day-to-day basis with reporters from our local newspapers and the metropolitan newspapers of New York City. I can only hope that the respect I gained for their integrity and dedication is mutual. It is my experience that a unified effort between law enforcement and the news media against crime is a recipe for success which is almost guaranteed.

I recognize, however, that in spite of the need for mutual cooperation, divergences of opinion exist among the law enforcement and news dissemination communities concerning the question of testimonial immunity for the newsman. However, it is my belief that there is a basis for the reconciliation of differing viewpoints on this important question and that reasonable men armed with empirical insight into the realities of the problem can come together on a middle ground. It is to the task of sketching in the outlines of this reconciling standpoint that I now address myself.

In a society which features expanding governmental bureaucracies, enlarging governmental jurisdiction, and progressive centralization of power; where powerful private interests such as organized crime challenge the primacy of government and corrupt its central processes, effective investigative reporting and opinon leadership based upon a solid underpinning of concrete factual knowledge becomes a increasingly urgent public need. Although the point is contested in some quarters, including the U.S. Supreme Court (see *Branzburg* v. *Hayes*, 408 U.S 665, at 693–95; 698–99), it is probable that the subjection of newsmen to compelled disclosure of confidential sources and the information obtained from such sources, whether published or not (see Henderson, "The Protection of Confidences: A Qualified Privilege for Newsmen," 1971 L. and Soc. Order 385, 406 (1971), will exercise some suppressive effect on news gathering by drying up such sources. However, the expectable degree of suppression, while not clearly established, probably is not great. (See Blasi, "The Newsman's Privilege: An Empirical Study," 70 Mich. L. Rev. 229, 270–274, 276 (1971).) Since, partly owing to managerial policy, approximately one-third to one-half of newsmen might be expected to cooperate with law enforcement, even if not required by law to do so (see Blasi, supra, at 256, 259), and since as great a number or more would go to jail rather than divulge confidential sources (see Blasi, supra, at 276–77), and because some potential news sources would be reluctant to give information even if the newsman's testimonial privilege were recognized in law (see Blasi, supra, at 274–75), the incremental suppressive effect of testimonial compulsion is, in all likelihood, not of great magnitude.

But, whatever the extent of the suppressive effect, if the content of news and its depth and quantity (see Blasi, supra, at 266–272, 274, 284) are thus diminished or impaired in the short-range interest of law enforcement, the ultimate result may be long-range disadvantage to law enforcement and social health. Such may be the consequence of a suppressive policy. That policy may choke off sources of information which would otherwise provide the factual basis for future newsstories alerting investigatory agencies to sub rosa crime-breeding conditions. And society at large, thus restricted in the range of its awareness, will lack the time by informational resources which would enable precise and knowledgeable adjustment to the special contours and peculiar dynamics of developing social trends.

Moreover, while the granting of a privilege to newsmen will occasion some evidentiary disadvantage to law enforcement, the extent of this disadvantage in all probability will not be substantial because: (*a*) reporters rarely have information as to specific crimes or guilt or innocence, which is usable as evidence in judicial forums except for occasional knowledge concerning victimless crimes (see Blasi, supra, at 276), and when they have such information, it can sometimes be obtained elsewhere; (*b*) about one-third to one-half of the reportorial establishment can be expected to cooperate by testifying even if given an absolute privilege (see Blasi, supra, at 256, 259); (*c*) even under a nonprivilege regime perhaps as many as one-half, or more, of all newsmen will accept contempt citations and jail sentences rather than betray confidences (seeBlasi, supra, at 276–77).

This conclusion gains confirmation from the fact that in States according newsmen a statutory privilege from testifying such as has been provided in 17 or 18 States, including my home State of New York (in the broad grant of privilege enacted in 1970 in sec. 179–h of the Civil Rights Law), law enforcement has not suffered a significant waning of competence traceable to such legislation. Indeed, the privilege against self-incrimination and the various other testimonial immunities founded on confidential relationships (doctor-patient, lawyer-client, husband-wife, clergyman-penitent) are, especially in the aggregate, far more significant in their obstructive effect on the judicial fact finding process, and yet public policy sanctions them on the theory that they serve more preeminent values than evidentiary perfection or juridical efficiency.

Since State statutes and nearly 100 Federal statutes "proscribe the compulsory disclosure of confidential communications in order to facilitate the free-flow of information to governmental agencies" (see *Henderson, supra*, at 276), it does not seem unreasonable to argue the advisability of an analogous policy in the nonofficial sector of news gathering in order to maximize the flow of information and the instruments of intellectual analysis to the public which must judge the performance of governmental agencies.

This is not to say that I believe that a Federal statute on the subject is an immediate and urgent necessity. Since the promulgation of guidelines for the issuance of subpenas by the Attorney General of the United States in 1970, the anxiety felt in some areas of the press community concerning the possible over use of the subpena power has somewhat subsided. Despite the fact that some observers have criticized these guidelines as vague, they have, on balance, had a "salutory effect" (see *Blasi, supra*, at 282–83).

Moreover, the freedom of the press has not suffered serious abridgement in the many years that the news media have operated in State and Federal jurisdictions not recognizing the newsman's testimonal immunity. On the contrary, American newspapers have compiled outstanding records of investigative and interpretive reporting without the assistance of the privilege.

In my community of Nassau County, both local newspapers, Newsday and the Long Island Press, over the course of the past 10 or 15 years have conducted very successfully investigations which exposed corruption and crime within our communities. The results which were turned over to my office for further investigation and prosecution. I should like, in passing, to pay admiring tribute to Newsday's recent and monumental investigation of the awesome problem of heroin distribution and addiction. In my judgment, this Newsday series attests to the surpassing importance of the enterprise of investigative journalism, and forcefully points out the urgent necessity for a vigorous and continuing journalistic efforts in this domain of action. I am also convinced that the Newsday series has not only produced the welcomed by-product of enhanced public understanding of the complexities of narcotic law enforcement but, more, has by the enlightened force of its instrument imparted to the armament of law enforcement a new and more serviceable weapon and broadened insight into those facets of the heroin problem which lie beyond the boundaries of local jurisdiction.

In my opinion, we would not be courting disaster if we continued the present system under which the privilege is granted by statutes in some states and, so some extent, by the Attorney General's guidelines at the Federal level. The present degree of protection might be enhanced by the formulation of guidelines by the National District Attorneys Association and the Association of State Attorneys General. Such a regime with the help of representatives of the press would be acceptable, if not perfect.

However, it seems to me that the enactment of a Federal privilege statute could achieve a useful, although not urgently necessary objective at this time, in view of the increasing use by newsmen of confidential informants provided such statute is confined in its effect to the Federal courts. Considerations of federalism and the ideal of local democratic control militate against the passage of Federal legislation which presumes to delimit local autonomy by imposing upon the states the peculiar balance of interests favored at the national level.

But if Congress is to bring its lawmaking powers into force, the question arises as to the form which its legislative initiative should take. Some commentators have clamored for the creation of an absolute privilege in the belief that a qualified privilege would not allay the information suppressing fears of confidential news sources. Others seem willing to accept a qualified privilege based upon a methodology of interest balancing (see *Henderson, supra,* at 402–04). It would appear that a majority of newsmen would find a qualified privilege acceptable even though they might prefer an absolute privilege (see *Blasi, supra,* at 282–83). I, myself, believe that a qualified privilege enactment is the more desirable approach. It would give scope for experimentation in the light of emerging circumstances and it would pay deference to the overriding goals of crime control and criminal justice in those situations where there is a strong public interest compelling indispensable testimony. But a qualified privilege statute may be implemented by one of two varying legislative strategies.

One possible statutory mode is that which conditions the operation of the privilege on a judicial determination of the relative weights of the First Amendment interest and the criminal justice interest. These being the primary interest categories, bases upon the reviewing judge's manipulation of a complex of variables in the form of statutorily mandated criteria. These criteria are such sub-interests or sub-categories under the above two sovereign interest classifications as (a) the seriousness of the crime, (b) the importance of the evidence, i.e., is it peripheral or essential to conviction or acquittal (if the subpenaing party is a criminal defendant), (c) the unavailability of other avenues of information on the one side, and on the other side of the balance, (1) the likelihood that testimonial disclosure will dry up an existing news source, (2) the value of the news source, (3) the possibility of eliminating future news sources, etc. The weakness of this approach as I see it is that it gives broad scope for judicial discretion even where the criteria of judgment are statutorily included and it makes it difficult for sources or prospective sources to know whether their identities or information will be kept confidential.

While judicial discretion cannot be banished wholly from the setting of decision, a more structured judicial technique is required to avoid an excessively personalized type of decision to insure that the interests given predominant weight in the balance carry that sanction of legislative approval which insures the conformity of balancing judgment with public convictions. If Congress should decide to enact a privilege statute, that statute should ordain only a qualified privilege along the following lines. Of course, these are suggestions. The privilege should provide for immunity from appearing before as well as testifying before, a grand jury or judicial forum, since mere service of a subpena or appearance often become known and has a tendency to dry up information sources in some cases. The breadth of the definition of the privileged class of newsmen would depend upon the congressional view of the relative importance of the various news and opinion media. As a minimum, it should probably include newsmen employed at radio and television stations and networks, news agencies, wire services, press services, and weekly news magazines, as well as weekly and daily newspapers which have been printed for 1 year or more.

If the privilege is to be effective, it must be broad enough to include the identity of a news source and the content of the information obtained from such source, whether published or not. It would seem logical to require that the privilege be conditioned on an express or implied agreement with the source that confidentiality be preserved. However, often where there is no such agreement in force (for example, where the matter has not even been discussed), disclosure would, nonetheless, dry up sources (see *Blasi*, supra, at 243) and, thus, care must be taken not to impose too onerous a precondition in this regard if the new statute is not to be rendered nugatory for a failure to heed empirical considerations. Interestingly, the New York State statute did not expressly enact a requirement of express or implied agreement, but such a provision has been read into the statute by case law. (See *In re WBAI-FM*, 68 Misc., 2d 355; *People* v. *Wolf*, 69 Misc. 2d 256.)

One method of control which takes account of realities might be a requirement that confidentiality depend upon a finding that disclosure would be likely to rupture or destroy a particular existing information-producing relationship. Such a rule could exclude or include one-shot tips from the ambit of protection but should probably include them since fruitful first contacts may lead to later fruitful contacts. Some observers might also argue that the decisional organ should also make a judgment whether such disclosure would dry up possible future sources. But if such a judgmental responsibility is imposed, it should be specified that this appraisal of possibilities must be based on facts or factually based opinion testimony rather than nebulous speculations concerning general impact, for example, on a showing that such disclosures have, in the past, made later contacts in a particular field of investigation reluctant to talk to a particular newsman. The privilege might also be limited to certain types of information or at least defined to exclude from its purview trivial types of information such as gossip.

The statute should further provide that the privilege shall not operate—

1. In cases where the newsmen's testimony is sought as to the commission of a particular crime which continues at the time the testimony is sought (for example, kidnaping) or which is intended to be committed in the future, or as to the identity of the perpetrator or the place and time of commission of the crime.

A. Where such crime is murder, treason, espionage, arson, assault with deadly weapon, bomb explosion, insurrection, and so forth (or other serious crimes if desired) but victimless crimes should probably not be included unless insofar as these other very serious crimes are concerned such information is available through another investigatory avenue.

B. Where such crime is armed robbery, burglary first degree, grand larceny, extortion, coercion (or other crimes if desired (unless information is obtainable through another investigatory avenue and unless the courts find that, on the particular facts under review, the continued flow of news outweighs the interest in obtaining the testimony sought. Senator, I find this last criteria adds another element of judicial subjectivism, but insofar as these lesser crimes are concerned, I submit that this may be added.

II. (A). Where the Government seeks the testimony as to guilt or innocence (or the whereabouts of a perpetrator).

1. In criminal cases where there has already occurred the crimes of murder, treason, espionage, arson, assault with deadly weapon, bomb explosion, insurrection, and so forth.

2. In criminal cases where there has already occurred the crimes of armed robbery, burglary first degree, grand larceny, extortion, coercion, unless the court finds that the public's interest in the continued flow of news outweighs the public interest in obtaining the testimony sought.

However, the privilege shall operate with respect to subsections A (10) and A (2) above unless the person or official seeking the testimony shows a reasonable ground to believe that the information cannot be obtained through another witness or source and is necessary to convict in that without it the case must be dismissed or will be so weak that a conviction would be improbable.

The immediately preceding provision would prevent compulsion of perpheral or unimportant testimony. A provision might also be included in all of the above sections that the subpenaing party at a trial upon challenge must show reasonable ground to believe that the subpenaed person has information of the type above described. However, out of respect for the practicalities of grand jury operations (see *Branzburg* v. *Hayes*, supra, 408 U.S. 665) such a requirement should not be enforced in the grand jury contest.

B. Where a private defendant seeks the testimony, I suggest that you include in this section substantially the same standards as in the sections on subpena by the Government. However, the list of crimes might perhaps be more extensive in view of the defendant's sixth amendment right to compulsory attendance of witness although it is certainly not established that this sixth amendment right might invalidate privilege statutes which operate as to criminal defendants.

Senator ERVIN. That is a very interesting point. Of course, the sixth amendment guarantees to every person accused in every criminal action right to have compulsory process of obtaining witnesses, but the courts have recognized that the established privileges, such as lawyer-client relationship, the physician-patient relationship, and husband-wife relationship and the privilege against self-incrimination does not conflict constitutionally with respect to the sixth amendment rights of a defendant.

Mr. CAHN. Yes, it is a problem which has been wrestled with for some time, and I think perhaps in all fairness to all parties concerned, the proper decision has been reached and the proper solution has been achieved.

All of the above scheme is only a rough outline. It is expressed largely in terms articulated categories which can be applied automatically—that is, type of crime—or by objective fact finding, that is, whether a continuing confidential relationship exists and will be destroyed. It keeps the subjective process of interest balancing to a minimum, although it includes a provision for such interest balancing with respect to crimes of lesser seriousness, as I pointed out. While the application of the categories, like all judicial judgment under general standards requires some scope for discretion, it is not the relatively more formless type of discretion involved in manipulation of interests, although, concededly, unavowed intuitions of interest may sometimes condition the process of enforcing general categorical standards.

The statutory design here outlined may deter news gathering more than would an all-encompassing absolute privilege legislative system. Nevertheless, indirect restraints on first amendment freedoms such as that occasioned by the exaction of newsmen's testimony can, consistent with the Constitution as interpreted by the U.S. Supreme Court and with sound considerations of practical policy, be enforced where justified by a compelling Governmental interest. Such interests certainly include the protection of the safety and lives of our citizenry through the conviction of the guilty and the acquittal of the innocent. The last objective also derives support from the defendant's right of compulsory process under the 6th amendment and the values underlying the due process clauses of the 5th and 14th amendments. These rights and values are certainly compelling interests.

In my view, the above scheme of qualified privilege is likely to deter news gathering less than no privilege at all. At the very least, there is a reason to think that experiment with some such scheme of qualified privilege will not lead to a disastrous crippling journalistic effectiveness because the news media has been operating vigorously in jurisdictions having qualified privilege statutes and those according no privilege to newsmen at all for many years of our national history.

It is the burden of this discussion that while the ideal of freedom of the press and the purposes of criminal justice may seem to conflict in the area of the newsman's privilege, an enlightened view may find the means of their accommodation. It is well that it should be so. For the innovating currents of expressionary freedom and the stabilizing forces of authority are both indispensible fundamentals of the democratic republic. The Nation which lacks the one or the other must soon submit to the inroads of barbarism. Freedom generates the impulses toward material and spiritual growth. Law and order provides the framework within which the energies of freedom may express themselves in responsible creativity. In the confrontation of these two great principles lies both the danger and opportunity of the free society. In their judicious synthesis rests the eternal hope of mankind.

Thank you very much.

Senator ERVIN. I want to commend you on the excellence of your statement. It manifests a profound understanding of the various considerations involved, and that there are several interests of society in this area. One, is the interest of society in knowing what is going on in the country, and the other is the interest of society in the ability of government to prosecute crime. Society certainly has the most important interest in that field. Another is the interest of society in seeing to it that those accused of crime are accorded fair trials.

We need to weigh all of these interests and try to balance the in such a way that we get the maximum support for each of these interests.

People must testify as to what they know, and privileges are exceptions to this general principle. The reason we have privileges is because of the conviction of our society that in rare instances the ability to refrain from disclosing knowledge or information outweighs, in particular instances, the full disclosure of that knowledge or information. Is that not true?

Mr. CAHN. Absolutely, Senator.

There is, as I stated, a balance of interests to which we must give attention, and in my judgment, the method that is suggested, perhaps it is a good one for reaching that end. However, I believe further that a qualified statute could give rise to experimentation in this area in order for us to reach the ultimate proper answer.

Senator ERVIN. As I think you very well point out, the problem in this field is not quite as great or crucial as some people profess to believe. In the first place, we have the rule of evidence, normally speaking, that a person is not required to testify at all, at least before a court, unless he has personal knowledge which tends to prove or disprove some matter in issue in the case. Most newspapermen do not see crimes committed. Most of the information they have in respect to crimes, for example, or any other event is obtained by them on the basis of information supplied by other people. Except for a few exceptions in the hearsay rule, they would not be competent witnesses if brought to court.

Now, is there any reason whatever for exempting a newsman, even if he is engaged in practicing his profession, from testifying as to a crime which he sees committed?

Mr. CAHN. No, and I frankly do not believe, from my experiences with the news media and the men and women who are associated with them, there is no problem in that area at all. They are more than willing and do more than the average layman in an effort to apprehend the perpetrators of crime and see that they are brought before the bar of justice. I don't think the problem exists there at all.

Senator ERVIN. Of course, I think from my own practice of the law and personal observation, that there is more danger of what you might call a fishing expedition or a dragnet investigation before a grand jury than there is in a court presided over by a judge who is learned in the rules of law. For that reason, in the bill I have prepared, I have a provision that where any privilege established by the bill is invoked before the grand jury, that the person invoking the privilege will have the right to have the matter determined by the judge presiding in the court in which the grand jury sits before he is compelled to give testimony before the grand jury. I think that is necessary protection.

Now, you emphasize the desirability of having a procedure which would immunize a newsman from having to appear, on the ground that his mere appearance would dry up his sources of information. It is true, is it not, that in many cases tried in the courts that the knowledge which prompts either counsel for the prosecution or counsel for the defense to call for the issuance of a subpena arises after the trial is progressing? You have a pragmatic situation there?

Mr. CAHN. Yes.

Senator ERVIN. I try to take these matters into consideration in this bill, and provide that the witness who is entitled to invoke the privilege may invoke the privilege just as we do now with other privileges, by oral or written objection at the time he is called on to testify. That would take care of the situation, where the witness is summoned or the supposed need for the witness comes to the attention of the court or the attorney after the trial has begun.

But it gives him an option. If subpened before the trial, then he can make a motion to quash or limit the testimony he is to give at the trial. If it appears that he has no personal knowledge that would be competent, and that the sole effort is to get him to appear in private, the court could enter an order to quash the subpena and excusing him entirely from testifying.

Mr. CAHN. I understand what you are saying, Senator.

What I was concerned with in this particular regard is the witness who is subpenaed, lets say for the sake of discussion, before a grand jury and has to invoke his privilege there. Well, the mere fact that he is subpenaed to a body which is in and of its nature secret, places a doubt in the mind of the news source which may prevent him from providing that particular newsman with further information and that might in an of itself be a danger. I think it can be avoided.

Senator ERVIN. I think you are right. You have to take the pragmatic factors into consideration. Normally, a witness is always summoned before the grand jury before the time of his appearance. That is ordinary practice; more so than at actual trial. This procedure to move to quash in order to limit his testimony would take care of it in most cases before the grand jury.

Mr. CAHN. Again I repeat, I leave the mechanics to the wisdom of this great body.

Senator ERVIN. You need a procedure which is practical, and above all, which takes into consideration what actually happens in these matters.

The last bill I have drawn, and it is a difficult field to draw a bill in, recognizes that there are two fields in which there should be some protection. One is that the newsman should not be required to identify the sources of his information if he has given them a contemporaneous assurance that he will not do so. I think he is entitled to that protection.

Then, it seems to me, this fishing around is sometimes done for unpublished information or any evidence of unpublished information. There should be some protection there.

Mr. CAHN. Well, there is no question you are right, but Senator, as I stated, I have a great deal of admiration for the integrity of the newsman, but I assure you by far my admiration for the law enforcement officer and the district attorney and the public prosecutor throughout the country is just as high.

As past president of the National District Attorneys Association, I can give testimony unhesitatingly and without any mental reservation at all that they represent the finest group in this country, publically dedicated with a sincerity of purpose that is unequal. I am just hoping—I pray that there is a mutual understanding. I think whatever difference exists can be erased, but more important than anything else, there has to be mutual trust.

No question, there are occasions which arise where that trust is destroyed in a particular individual or in a particular group of individuals, and I think its important that our news media be given the opportunity and be given the right, and it is almost a duty on their part to bring that to the attention of the public, but with that right, with that authority as well as the right and the authority of the prosecutor comes responsibility. The responsibility has to be borne properly. Once the responsibility is disregarded, then the right is going to be abused and the power given both to the press and the prosecutor can be dangerous.

We know power can corrupt and absolute power can corrupt absolutely, therefore, we look constantly for proper restraints on power in accordance with an equal amount of responsibility. If we can just synthesize all of that together in a unified movement with mutual respect I don't think there is going to be any problem at all.

Senator ERVIN. As a matter of fact, it seems to me that so much of the information, even hearsay information, that a newsman gathers not from confidential sources, is made available to the police. Newsmen, most of them that I have known, have been willing to cooperate with the law enforcement officials in respect to such information.

Mr. CAHN. After 23 years, Senator, in law enforcement, and as I stated, almost on a daily basis, working basis with members of the press, I can say that I have absolutely no recollection of any problem in this field at all. Perhaps in a different area of newspaper reporting, but nothing of any substantial nature in this particular area of newspaper reporting. Quite to the contrary, always had the fullest cooperation.

Senator ERVIN. Well, that has been my experience in the practice of law and my observation.

You have given a most helpful exposition of the problems.

Mr. CAHN. Thank you very much. I apologize, but I do have to make a plane, but I leave you in the hands of our capable president-elect, the Honorable President John J. O'Hara.

Senator THURMOND. May I just say this—I think you have made one of the finest statements I have seen presented on this subject, and I want to congratulate you on your excellent presentation.

Mr. CAHN. Senator Thurmond, you are most kind, and I thank you sincerely.

Mr. O'HARA. Mr. Chairman and Senator Thurmond, I know the morning has been long and when you appear on the program at the particular moment that I am here I know there is some restlessness among the others that are listening to you.

Senator ERVIN. Well, I can say Senators are not only great talkers, but they are great listeners, too.

Mr. O'HARA. I will say I will try not to reemphasize or reiterate anything that has been said before.

Senator ERVIN. Do you have a written statement?

Mr. O'HARA. I only had time to prepare an outline, Senator.

Senator ERVIN. I just want to say that if you had a complete written statement I would order it printed in full in the body of the record, but if you don't have a written statement we will just get your oral testimony.

Mr. O'Hara. I don't have. I apologize. I have two reasons, my inexperience and lack of time and I also apologize for my voice which is heavily laden with a cold at this time and I also apologize because the information I bring to you has been previously brought to you or maybe will be insignificant in your opinion, but I think if I can lend anything to this concept which is so important to all of our lives it might be from the standpoint of a small town prosecutor. I am not nearly as profound or erudite as my predecessor here at the microphone. I come from a small northern Kentucky county.

Senator Ervin. I am a country lawyer myself.

Mr. O'Hara. My staff consists of one assistant and one secretary and what little bit we can put into this.

I do have some progenitors from Ireland, and because of that I do have a deeper feeling for the fundamental sense of the constitutional issues than maybe others. Maybe not. But at least I have that feeling that I can express that experience with some degree of certitude.

I don't feel and I don't think this committee feels that the Founding Fathers intended to give complete freedom to our brothers of the news media. I think to do that would have been contrary to the intentions of the framers of the Constitution. Their information was that government should not control the press or the news media in those days, and certainly the converse of that is true—the press should not control the Government. If that were not so I suppose under the common law we would never have had a law of misprision—that is, failing to disclose when asked of the commission of crime in one's presence—and the common law or early statutory law expanded that concept, as you well know, to many of the states.

What I champion for is the qualified right. The statute of my State, which I will allude to, was tested in the *Branzburg* case. However, I think this is a common denominator between the newsman and the prosecutor in their everyday efforts, and I suggest rather than competition, we need cooperation. I think that common denominator has been eloquently expressed by Senator Percy, who testified that had not the news media brought things to the public attention, perhaps it would have gone unprosecuted or unnoticed.

I hasten to add to that observation, I think little if any of the information that was produced in prosecution was brought from this source, but rather brought to scrutiny, implemented by the investigation, and perhaps it gave some key sources of information that could be elaborated upon or pursued by law enforcement.

On the other side of the coin is something we haven't talked about here yet.

We have talked about everything, only about forcing the news media to come forward. On the other hand, have we thought about those times when the prosecutor asked the news media: Mr. Editor, Mr. Reporter, would you suppress this piece of evidence; would you at least withhold that until I have an opportunity to investigate it, and because your publishing it may seriously impair, if not completely emasculate, my ability to do my job. The majority of the news media, who are very reputable, would comply with the prosecutor's wishes.

I have an oath, too, and I want to perform it.

I want to say in my experience of 14 years, the news media, when I have made that request of them, with but one exception, has complied.

I have just finished a tour of duty as president of the Kentucky Bar Association. I have the experience of meeting with the news media, of working out guidelines of a free press and free trial, which has been a problem in other areas of this country. And I want this committee to know that that is certainly an area that should not be completely overlooked. It may be that a statute on the books does not have to be as definitive as we are thinking about, but let the two factions get together and work them out. They are both intelligent. They share the common denominator where this field brings them into cooperation and not competition.

I fear only an absolute shield that can be utilized by the unscrupulous, unethical members of the news media who might use this absolute shield to destroy. As has been said, the pen is mightier than the sword, and I have not found a surgical technique that can cure the wounds of the poisonous pen.

An unscrupulous member of the news media might publish a rumor in a gossip column; for example in the area of northern Kentucky, that the prosecutor's office is taking payoffs. Under an absolute shield, I could do nothing. Under the qualified shield, I could ask him all but his source, but, in either event, only if and when he published the statement.

I am limited to do anything if his lips are sealed except to ask him to come forward and ask him what is the source, because my statute gives complete immunity as a source and complete immunity to unpublished acts.

If he could do that maliciously or otherwise, it puts the public official at a decided disadvantage, and one that is almost insurmountable.

I think it is the exception rather than the rule. But laws are made to protect all interests equally and exceptions have to be considered.

I recall in my tenure in office when a newspaper in our particular State took out a campaign against the prosecutor saying: Look at all the Federal gambling stamps in his jurisdiction; he does nothing about it, not recognizing that the Supreme Court had held that the mere possession of a gambling stamp was not cause to permit him to go any further than your front door.

So I say these are commingled considerations to which you must give consideration, and I say they bear reciprocal rights and responsibilities.

The Supreme Court has said on the civil side that the news media, in writing about a public official, is not subjective to civil responsibility or damage unless one can show malice.

Then perhaps this is a consideration, at least in the conduct of the office of the public official.

In the words of the Court in the *Branzburg* case, I think it is all summed up in this prosecutor's standpoint, "Is it better to write about crime than to do something about it?"

Now, I have had only one experience in my years concerning this, and that was where a gossip-type columnist wrote there was gambling of some extensive proportions in one of the cities of my jurisdiction.

Of course, this brought a cry from a local police department. Using our statutes and the immunities provided thereunder as previously enunciated here, we called this man before a grand jury to get to the bottom of it. We found, not much to our surprise, he didn't have any positive judicially admissible evidence available, but I heard from a source who had heard from a source, and so forth, which was tertiary hearsay.

So it is very seldom that the prosecutor is called to use this as a fact but should be available where that is the only source of information and the sole way of getting to the truth of the matter.

One other consideration——

Senator ERVIN. I would state that many years ago in Asheville, N.C., a commentator kept writing articles to the effect that the lawyers in the Superior Court of Buncombe County bought jury verdicts just like a person would buy sacks of potatoes.

And the judge, under the statute of ours that allows a judge to appoint himself as committee magistrate and conduct an investigation, subpenaed the commentator before him in open court and called on him to produce the evidence that justice was being corrupted by the purchase of jury verdicts by lawyers. It turned out the man had absolutely no evidence, no information, nor anything but suspicions of his, which was a very harmful thing.

Fortunately, the great majority of newsmen and commentators have greater intellectual integrity than to write or publish that kind of thing.

Mr. O'HARA. Absolutely correct.

If it happens there should be an atmosphere permitting it to be cured so the public doesn't get a wrong idea. If it is wrong, is true and is factually accurate, then it should be brought positively, as we pointed out before.

I know the time is getting late and I know you want me to abbreviate somewhat my remarks. I will only conclude that I have worked with this statute in Kentucky all my prosecutorial life, so has the news media. It is not any inequity; cooperation with the news media and my office is excellent.

I would hope to think from their side of it they would say the same thing is true.

But suffice it to say, as I said at the beginning, if we could only emphasize that by and large our friends in the news media are not in complete agreement that they should have an absolute shield that has been talked about, and for one instance I cite you to an editorial by William Buckley entitled "Does the Press Need a Shield?" Still there are many others who have had vast experience, who could get together and work on this problem, that the problem isn't as big as we think it is as we sit here in Washington and experience it. Experience has not indicated that it is, and I would hope the future would indicate that it is not.

I would say in conclusion as a prosecutor from a small area, and as the president-elect of the National District Attorneys Association, I want to thank you for asking me to be here and qualify my remarks by saying they are not an expression of the organization I am affiliated with, but rather my own and probably they weren't too earth shaking or intellectual, but I hope they were helpful.

Senator ERVIN. You have made some very fine observations and your testimony has been very helpful to the subcommittee.

The newsman does not ordinarily have personal knowledge of a commission of a crime, even though he writes about them. Is that not true?

Mr. O'Hara. Yes, sir.

Senator Ervin. He gets his information from others and normally it is heresay, which is not admissible in a court of law.

Mr. O'Hara. Correct.

Senator Ervin. So the rules of evidence would take care of the great majority of cases involving information gathered by a newsman. The rules of evidence would prevent its presentation in the court; would it not?

Mr. O'Hara. Right.

Senator Ervin. This is a matter that requires a lot of consideration, because we have a lot of interests to balance; not only the interests of the public in knowing what is going on, but the interests of society in seeing that the accused is given a fair trial according to the sixth amendment and the due process clause.

It seems to me that as far as a news gatherer himself is concerned, when he is called on to testify orally, that the only privilege that should be created would be a privilege which exempts him from having to disclose the identity of the sources of his information where he has given them contemporaneous assurances that he will not do so.

Mr. O'Hara. I agree, sir.

Senator Ervin. In other words, if a man gives him information without any confidentiality about it there is no reason in the world why he should not testify?

Mr. O'Hara. The problem does not exist; that is right.

Senator Ervin. There have been, in my judgment, "fishing expeditions," both in congressional committees and in grand juries sometimes, fishing expeditions which require the production of unpublished information. I do think there ought to be something done to prevent such fishing expeditions.

I have the feeling that where information has been published that nobody has any right not to testify to it. Anything that has been put in the public domain should be testified to by anybody who has any knowledge about its publication. I would like to have your views in respect to making a distinction between published and unpublished information.

Mr. O'Hara. I agree wholeheartedly with that, because the community problem doesn't arise where there is unpublished information. It is only where it is published and seemingly the prosecutor does nothing or he is incapable of doing anything, and where the civic communities and interests and possibly furor has been aroused by this act or series of acts or situation when the reciprocal right to investigate it and look into it.

I would only qualify it, as the Supreme Court, and if I may read from the opinion of the *Branzburg* case: "The sole issue is the obligation of reporters to respond to grand jury subpoenas as other citizens and to answer questions relative to investigation into the commission of crime."

Now, I think that is very significant. Certainly, it doesn't ask them to reveal their source, and the confidentiality of their source can be maintained ad infinitum, for that matter.

Because it was produced in a judicial proceeding and resulted in a conviction, isn't there something to be said for that as opposed to allow for the person who is guilty of this crime to hide behind an absolute shield?

Senator **Ervin**. In the *Branzburg* case, where people invite a newspaper reporter to come in and see them committing a crime, I don't see very much justification for not requiring him to testify.

Mr. **O'Hara**. What I am saying, Senator Ervin, even with the Kentucky statute that has both the elements which you suggest, which I agree wholeheartedly with, there wasn't any problem there. There was the problem that the reporter felt he was put upon, but there wasn't the problem that law enforcement couldn't proceed effectively and to this day they don't know the source, unless it came to them inadvertently, not through the judicial process.

Senator **Ervin**. I have the feeling that it was unfortunate that the *Branzburg* case and the *Caldwell* case were considered at the same time together. In the *Caldwell* case the circuit court of appeals had balanced in a most admirable fashion the interests of society in enforcement of law and the interests of society in having a free of information concerning an organization that was suspected of subversive programs. They had concluded under all the facts of the case that the reporter should not be required to appear, and I think that was a correct decision on the facts as I interpret them.

So we had those two cases together and I was rather disappointed the Supreme Court in the *Caldwell* case did not balance those two interests. That would have been so much better than trying to have a rigid statute.

Mr. O'Hara. Of course, you realize the Court did make that distinction in the dissenting opinion and I think made it rather adroitly.

But what you say is the weighing of those two interests is precisely the question before you.

Senator **Ervin**. I want to thank you very much.

By the way, Theodore O'Hara, wasn't he a Kentuckian?

Mr. **O'Hara**. Theodore O'Hara?

Senator **Ervin**. I think there are many impressive things over in Arlington Cemetery, but I think even more impressive than the gravestones that mark the gravesites of so many heroes is that very beautiful poem on Mr. O'Hara's marker.

Mr. **O'Hara**. He was a distant relative and unfortunately he took all the O'Hara brilliance with him.

When I visited Ireland, I saw this fascinating epitaph on a tombstone and it read: "Pause ye, stranger, as ye pass by, where you stand once was where I stood, where I am you shall be," and he gets an awful lot of prayers.

Senator **Ervin**. There was another one in an Episcopal church in South Carolina that says: "My name, my country, what are they to thee, whether high or low my pedigree. Perhaps I far surpass all other men, perhaps I fell far behind them all. What then, suffice it, stranger, that I see the atom. Thou knowest its use; it hides no matter whom."

But we are getting on very grave topics right now.

Mr. **O'Hara**. Very grave.

Thank you very much.

Mr. **Baskir**. Mr. Chairman, Congressman Kuykendall would like to introduce the next witness.

STATEMENT OF JOHN MEANS, STAFF ASSISTANT FOR CONGRESSMAN KUYKENDALL

Mr. **Means**. Mr. Chairman, my name is John Means, staff assistant for Congressman Kuykendall, and he was here but he had to return to his own committee for some very important matters concerning skyjacking legislation which is being considered over there this morning.

I appreciate the opportunity to substitute for him in the introduction of a personal friend of mine as well, but with these introductory remarks the Congressman had prepared, if I may:

Mr. Chairman, it is my distinct pleasure to introduce to you your next witness, since he is not only one of my constituents, but a personal friend as well. I think you will learn in the next few minutes that Joe Weiler is what this hearing is all about.

You are going to meet a young newspaper man sent out to do his job, and because he did it and did it well, he found himself threatened with a jail cell.

The Weiler case is as blatant as any that may come before you. Public officials, puffed up by their own importance, decided to make an example of this young man and the distinguished newspaper that he represents.

Why did they do this? Because Joe Weiler wouldn't tell them who finked. They were charged with investigating improper conditions at a state children's hospital, but they quickly became more interested in finding out who revealed those conditions to the news media than in correcting the conditions.

Joe Weiler did not go to jail, no thanks to those public officials. The next time these same officials may succeed in jailing anyone who does not bow down to them.

Mr. Weiler is here today to try to keep that from happening.

Senator **Ervin**. We are delighted to have you with us and delighted to have Mr. Weiler with us. I remember reading at the time of the occurrence of his experience, and like most people, I was very much shocked by the public officials who were more concerned about extracting from him the sources of his information than they were about correcting the conditions which the information revealed. That should have been their consideration.

We are delighted to have you with us.

STATEMENT OF JOSEPH WEILER, REPORTER, MEMPHIS COMMERCIAL APPEAL

Mr. **Weiler**. Thank you, Mr. Chairman; it is a pleasure to be here. I can give you a brief outline of my case so that you can understand better the problems that we face in Tennessee.

In early June, the *Commercial Appeal* received an anonymous call from a person who wanted to make public information previously unknown concerning widespread child abuse at Arlington Hospital and School for the mentally retarded, a state-run institution.

I was working as night rewrite man and routinely handled the call. The caller began listing names and dates of persons fired and suspended for child abuse and referred knowledgeably to the workings of the hospital.

Because rumors and reports of child abuse at the hospital had continued since shortly after it opened 4 years ago, I was particularly interested in the information. Efforts to learn details of alleged child abuse earlier had proved futile.

The caller agreed to meet with me to discuss developments at the hospital. At the meeting, the caller agreed to provide names, dates and some documentation—none of it illegally obtained—concerning child abuse and hospital actions concerning such abuse. In return, I had to guarantee his anonymity. The source said he—not to imply the person was a man—feared reprisal if his name were made public.

At the meeting, I was provided with names of persons already fired and suspended from the hospital during the past month as well as some details concerning an investigation the hospital staff had made into reports of recent child abuse.

During the next several weeks, I began checking each name and each fact. This led to new names and information, all of which substantiated the original statements made by my first source.

When I was at last able to confirm a substantial part of the source's story, I went to the hospital administrator, Frederick Nowak on July 19, and asked him to comment on the firing of eight employees, the suspension of eight others and the continuing problems the hospital was experiencing with child abuse.

He confirmed all the information which I had already gathered and explained further about the hospital's attempts to solve the problems of child abuse during the previous month. He admitted that although the problem had been known to the administration for more than a month, no public statement of the hospital's problem had been made.

The next morning, the *Commercial Appeal* printed the first story on child abuse at Arlington.

All the information in that and subsequent stories I wrote on the problems at the hospital was verified as true by hospital administrators, who were identified and quoted in the stories. No information was attributed to unidentified sources, although it was made clear that the *Commercial Appeal's* investigation was prompted by anonymous sources.

As a result, a State senate committee was called in to investigate and the juvenile court in Memphis investigated several related charges of abuse.

Within a week, a ninth employee of the hospital was fired and three more reprimanded for child abuse.

On September 7, the senate committee met at the hospital and on the first day subpoened employees and former employees of the hospital and questioned them concerning child abuse.

The second day, the committee began subpenaing newsmen. Among the first called was Joe Pennington, a WREC radio reporter, who had begun his own investigation into irregularities at the hospital following the first disclosures of child abuse. He was asked some general questions and then asked to reveal the source of his information and to provide the committee with all his tape recordings, notes and documents concerning the hospital and child abuse. He at first refused.

However, after the committee had threatened him with jail for contempt, he finally agreed to reveal his source during an unusual closed meeting of the committee. Under Tennessee senate rules, committee meetings can only be closed in cases where serious injury could occur or the national security is threatened.

The name Mr. Pennington gave to the committee, a secretary to one of the hospital staff members, was made public moments after the hearings were opened to the public that afternoon. The woman identified, Mrs. Geraldine Blood, was called and asked if she was his source. She denied having provided Mr. Pennington with any documents or information.

Mr. Pennington then produced evidence to indicate she had, and the matter was referred to the county grand jury to investigate the possibility of bringing perjury charges against Mrs. Blood or Mr. Pennington. Those charges are still pending, and Mrs. Blood, who was dismissed from the hospital staff the same day, remained unemployed for the next 4 months.

The next day, Saturday, I was called. I was first asked some questions about child abuse at the hospital. Then I was asked for the original source of my information and to produce all my notes and material pertaining to the hospital and child abuse.

I refused on the grounds that the name of my source was confidential and privileged information and that surrendering my notes and material would disclose the identity of that person. I explained that I was in possession of no information or documents illegally gained or not rightfully the possession of the persons who shared them with me. The committee refused to accept this explanation and demanded that I identify my source.

I then asked for a recess to consult with my editors and lawyer—who were not present—and the hearing was adjourned until the following Monday, September 12.

On Monday, the committee again demanded the name of my source and my notes. In response, I offered to supply them with portions of my notes I believed would not tend to identify my source, but could not provide all of my notes.

I again explained that all information I had printed had been confirmed by the hospital administration as true and no statements of any kind had been attributed to unnamed persons in any of the articles I had written.

In response, the committee ordered me to show cause by November 13, why I should not be held in contempt of the committee.

That hearing was subsequently delayed until December 13 while my legal brief was drawn up. A few days prior to the hearing, the attorney general, at the request of a committee member, ruled that the committee was no longer legally constituted as of the November 7 election and would not be empowered to hold such a hearing until the new State legislature was organized and committees appointed.

No such hearing is now anticipated and the state legislature is presently considering the free flow of information legislation which has been introduced.

However, investigations, which were being conducted at the time the hearings started, came to an abrupt halt and have never been reinitiated. It is doubtful now that any employee at the hospital would be willing to talk to newsmen concerning events at the hospital in view of the fate of Mrs. Blood. The committee had the effect of dampening the press' efforts to determine what was happening at a State-run, tax-supported hospital.

The senators themselves did nothing to conceal that this, in fact, had been their primary aim. When the three-and-a-half day hearing ended, the chairman, Senator Fred Berry of Knoxville, said it had been called primarily because newsmen persisted in asking questions about alleged child abuse.

"It was about to get out of hand . . . You (newsmen) were hampering the operations of the hospital" Senator Berry said. "Does the news media have a right to join with a State employee in investigating matters pertaining to the State?" the committee's legal counsel, Senator Edgar Gillock of Memphis, asked.

The answer must be yes. In cases of mismanagement, misuse, abuse, illegal activity and incompetence, it is unlikely that those involved will be willing to come forward to admit their own involvement.

In such cases, it is concerned, but anonymous persons, speaking to the public through the press, that awaken citizens to the problems that may have been hidden from them. In my case, that problem was child abuse. Publicity was a catalyst in creating the cure. The committee itself was called as a result of that publicity.

But some persons fear that in granting what many call "Newsmen's Privilege," newsmen will be able to withold valuable information that could be of great importance to government, police or the courts in the prevention of crime. But, it is not the job of newsmen to conceal information. It is a newsman's job to inform the people. In asking for legislation, we are not asking for a special right to withhold information, but further insurance of a constitutionally guaranteed right to gather and spread that information, unhindered and unintimidated. During the past year, newsmen have not felt unhindered and unintimidated and the press cannot operate freely under those conditions.

Senator **Ervin**. If this bill which I have drawn had been in effect in Tennessee or rather had been adopted prior to your experience, you would have avoided suffering that experience. This bill provides that it applies to a state body as well as to a Federal body. It applies to a legislative body and it expressly includes a legislative body such as the Congress or the legislature of a state or any committee or subcommittee acting under the authority of the Congress or legislature of a State.

It defines a newsman as being an individual who is regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by any means of communication. You were regularly employed by the *Commercial Appeal* to collect information to be disseminated through its columns to the public, were you not?

Mr. **Weiler**. Yes.

Senator **Ervin**. And you received information concerning child abuse from people who would not have been willing to disclose that information to you unless they felt that you could protect their identity from disclosure. Is that not true?

Mr. **Weiler**. Yes.

I would like to point out that one of the most important facts—of course, I was not jailed and I was not forced to produce the information, but the very fact that the investigation was held by the committee and that it did turn on newsmen's sources had a very chilling effect, and this created difficulties in gathering news in that area.

Senator Ervin. Well, the truth of it is that most people who work for a State institution, such as the hospital that was involved in this case, are people by reason of the very nature of our economic system have to earn a livelihood for themselves and their families. There is a very chilling effect upon people who have to earn a livelihood for themselves and their families to have a threat hanging over them they will be fired from their jobs if they are identified as having revealed information, such as in your case where the authorities that were supposed to look after little children who were retarded were abusing those little children.

So there is no doubt of the fact that the personal identification of the informants under those circumstances is going to dry up the sources of any further information from those informants, and also from other people who have like knowledge. It will deter them from giving it to newsmen, isn't that true?

Mr. Weiler. Yes, it is.

Senator Ervin. This bill fits your situation entirely. It says when a newsman appears before a court, grand jury, legislative body, or investigative or adjudicative body as a witness in obedience to a subpena as a party to a civil or criminal action or otherwise, he may invoke the provisions of section 5 of this article by oral or written objection, and the court, grand jury, or legislative body or adjudicative agency shall thereby enter such order or take such action as may be necessary or appropriate to make necessary the newsmen shall not reveal information disclosed to him contrary to section 3.

Section 3 says a newsman shall not be compelled to disclose to a court, grand jury, legislative body, adjudicative or investigative agency of government the identity of any person who supplies information of any character to him while he is engaged in his occupation if he expressly or impliedly gives the person information on a contemporaneous assurance that the information will not be disclosed by him.

As you so well point out in your statement in the clearest fashion, it was not your purpose to conceal information. On the contrary, it was your purpose to procure information and to publish that information so that the public would know what was going on at that institution. All you were seeking to do was to protect the sources of your information against being discharged or otherwise punished on account of the fact that they had disclosed to you a situation which certainly needed correcting.

Mr. Weiler. I think, Mr. Chairman, that so often people worry about the information that newsmen would withhold should they be given this so-called privilege, but newsmen don't make a living by withholding information. It does me no good to go out and gather news if I don't print it in the paper for everyone to see.

My boss soon is going to start frowning on me if I say, "Look, I have all this good information but it is all confidential and we can't share it with anyone."

There is no effort on the part of newsmen to gather information they can't disseminate, and I think an unfounded fear on the part of people.

Senator Ervin. But isn't there a real danger that a newsman may not gather information, or if he gathers information, that he may not write a story based on it if he is under the Damoclean Sword of the threat of being imprisoned or punished because he fails to disclose the sources of his information?

Mr. Weiler. That is true.

It can have very severe effects on news gathering.

Senator Ervin. If a man feels that if he writes a story based on that information that he may wind up in jail, there is going to be a very chilling effect not only on his informants, but also upon his decision to write the story?

Mr. Weiler. I am sure newsmen throughout the country feel very intimidated and are looking forward to legislation being passed.

Senator Ervin. I want to thank you for your appearance and giving us this dramatic story about what almost happened to a newsman, or what they attempted to do to a newsman, simply because he went out and gathered information which the public was entitled to have. The public was given through your agency merely because you were willing to publish the information. You just felt that it would be violating your code of ethics if you divulged the identity of those from whom you obtained the information.

I thank you.

Mr. Weiler. Thank you.

Mr. Baskir. The final witness this morning is Jack L. Bradley, president of the National Press Photographers Association.

Senator Ervin. Mr. Bradley, I want to welcome you to the committee and express our appreciation for your willingness to come here and give us your views with respect to your association.

STATEMENT OF JACK L. BRADLEY, PRESIDENT, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Mr. Bradley. Thank you, Mr. Chairman.

I am Jack Bradley, president of the National Press Photographers Association and a staff photographer for the *Journal Star* in Peoria, Ill.

As president of the National Press Photographers Association I represent and speak for 4,000 professionals who work on newspapers, news magazines, wire services and television stations throughout the country.

NPPA is a voluntary, professional organization dedicated to improving the technical competence and the effectiveness of its members as visual communicators, in the public interest.

We believe our service of visual communications is vitally important to the public welfare. We as communicators of information to the public have no other reason for our existence other than the public interest.

We pay good hard-earned American dollars for our dues to belong to this organization and for admission fees to educational seminars we stage throughout this Nation because we believe in our stated objectives. We feel that the better and more accurately we are able to communicate, the better we will be able to serve the public interest.

In recent years I have been traveling the country speaking out about the problems we face in doing our job as "visual communicators." This past year I have seen cases of our members being thrown into jail because of their unwillingness to give up film or notes. I have seen the Attorney General's guidelines in action in both state and Federal courts and quite frankly, I am concerned.

The Federal Government has attempted to enjoin the press from publishing news about the Pentagon history of the Vietnam war. It has subpenaed newsmen and photographers for grand jury and congressional committee appearances. We have on file the documented cases of Government investigators posing as newsmen and photographers. Some officials have even gone as far as intimidating the broadcast media by thinly veiled threats of new governmental controls and reprisals because of allegedly slanted news reports on the administration.

When you add these threats to the Justice Department's use of lie detectors to check on news leaks by Federal employees and the Army's surveillance of political activities of private citizens, the Government's chilling campaign against the exercise of the first amendment rights becomes a matter for grave public concern.

If news photographers are forced to reveal the sources of their information it will cut off many of their sources, and as a result the American public will get less information about the condition of their political, scientific, economic, and cultural environments—information the public must have to be able to make informed decisions on matters of public conduct in this country.

Historically, there has always been controvery between our Government and those who report its activities. Such controversy is healthy. The winner has always been the public which as a result of the controversy is better able to render its decisions in the ballot boxes.

I have heard of many cases in the past 2 years where editors and photographers have destroyed negatives and thrown away notebooks for fear of having to spend days and weeks in unnecessary litigation.

I personally was subpenaed by a Federal court to produce a photo that was used in the newspaper about 1½ years after it appeared. I spent nearly a whole day searching through my files and producing the print. I spent another day appearing at the hearing and was paid a token witness fee.

My employer was out 2 days' work as a result of this action. Files of newspapers and TV stations throughout the country, I am told, have been fair game for legal "fishing expeditions" as a result of local and State interpretations of the Attorney General's Federal Guidelines.

This subcommittee hearing can serve a useful purpose today if it does one thing—that is to make the public aware of what the first amendment was designed to do by our Founding Fathers. That is to guarantee the right of the public to criticize our Government—even to put forth ideas and thoughts that our Government might hate and despite. To insure that right the press was given a constitutional right to serve as a check upon Government.

I might point out that with all its vast power and resources the U.S. Government has no difficulty in getting its message across. The individual citizen needs an independent and unintimidated press to serve as a balance against the inevitable excesses and abuses of Government.

Last September 21, at a House Subcommittee on the Judiciary hearing on proposed legislation to create a newsman's shield bill, Assistant Attorney General Roger C. Cramton said there was no need for "shield" legislation for professional journalists. Since that appearance, more than a dozen cases can be cited to show why we do need legislation to make it clear that the first amendment is an "absolute" and not a "qualified" guarantee that newsmen can protect the sources of the information they gather.

The National Press Photographers Association joins the other members of the Joint Media Committee on Free Flow of Information in support of this absolute right as outlined in the first amendment. We urge members of Congress to enact legislation to stop any further proliferation of these injustices to newsmen and interferences with the right of the people.

I would like to challenge each of you gentlemen to work for the passage of this vital legislation. Each of you are sworn to serve the public interests, and as legislators it is incumbent on you to act with dispatch in the public interest in this case.

These are difficult times to be a newsman and photographer. The pressures are great and the day is inadequate.

We know our job is the key to maintaining the basic strength of our democracy which depends upon the citizen's right to know. Only through the free exercise of that right can we preserve and improve our way of life.

I and the 4,000 members of the National Press Photographers Association believe the freedom of press guaranteed by the first amendment means more than our freedom to report the news. It means the public has a right to get that news. It's up to each of us in this room to protect both rights. As professional photojournalists we have a job to do. It is to inform the public about events, and we do it with news photographs and film. We are not policemen and we cannot afford to have our role diluted. That is why I have gone to great lengths to outline the duties and responsibilities of the free press to the free citizenry. The free press is vital to our society. I urge each of you to take up the challenge you receive today from the groups of journalists who have testified today.

Senator ERVIN. You state that last September 21, there was a House Subcommittee on the Judiciary hearing on proposed legislation to create a newsman's privilege. Assistant Attorney General Rogers C. Cramton said there was no need for shield legislation for journalists.

I would introduce as exhibit A to show the need for such a shield the witness who just preceded you on the witness stand.

Mr. BRADLEY. Correct.

Senator ERVIN. I am not—as I stated during the testimony of the previous witness—I am not concerned about news which is published.

Mr. BRADLEY. Neither are we.

Senator ERVIN. I think that where news has been published and put into the public domain that it is all right to have the newsman testify.

Furthermore, people who have possession of personal knowledge upon which that news is based should be required to testify just like any other citizen. I do recognize that press photographers constitute a very essential segment of the news media of this country. I can never forget the old Chinese proverb that: "One picture is worth a thousand words." I think that pictures have a way of illuminating information which they convey most effectively.

So my bill, which undertakes to protect and give certain privileges of nondisclosure to newsmen, defines a newsman as an individual who is legally engaged in the occupation of making pictures for dissemination to the public by any means of communication.

The bill gives protection to any newsman against the disclosure of the sources of his information where it is received in a confidential capacity. It also provides that there shall also be no compulsory production of unpublished information, and it defines the unpublished information as follows:

> Unpublished information means any information received by a newsman while engaged in his occupation which has not been published or broadcast by any means of publication, and includes any memorandum, note, manuscript, transcript, picture, negative, recording, tape or other record whatsoever containing or evidencing such unpublished information which was made or obtained by a newsman while engaged in his profession.

I think that that would protect from compulsory disclosure any unpublished pictures or negatives made by a news photographer while in the exercise of his occupation. I think that news photographers are entitled to the minimum protection this bill would give them, both as to the sources of this information which is received in confidence, and also against producing any of the pictures or negatives or other records which they make at that time which are unpublished.

Thank you very much.

Mr. Bradley. Thank you.

Senator Ervin. We will place in the record the statement of Robert G. Fichenberg, chairman of Freedom of Information Committee, the American Society of Newspaper Editors, and Executive Editor of *The Knickerbocker News-Union Star* of Albany-Schenectady, New York.

Mr. Fichenberg has agreed to submit his statement in lieu of oral testimony.

[The full text of Robert G. Fichenberg follows:]

Statement of Robert G. Fichenberg, Chairman, Freedom of Information Committee, American Society of Newspaper Editors, Executive Editor, the Knickerbocker News-Union Star, Albany-Schenectady, N.Y.

My name is Robert G. Fichenberg. I am Executive Editor of *The Knickerbocker News-Union Star* of Albany and Schenectady, New York. I am here today in my capacity as chairman of the Freedom of Information Committee of the American Society of Newspaper Editors. I am deeply grateful for the opportunity to testify before this Committee on a subject of urgency and critical importance to the American people.

I think it is important to stress, at the outset, that the cause for our concern is not—as too many individuals may think—an issue involving primarily the news media, their sources and the courts. It's far broader and deeper than that. What is at stake is nothing less than the constitutional right of a free people to be adequately informed without interference by the government.

Some 37 years ago, the Supreme Court of the United States said that the purpose of the First Amendment is "to preserve an untrammelled press as a vital source of public information . . . and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression of abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

As the late Justice Hugo L. Black said: "The press was to serve the governed, not the governors . . . The press was protected so that it could bare the secrets of the government and inform the people."

Ironically, the danger to which an earlier court alluded is now here, as the result, in great part, of a decision by the present court.

So the concern that I express today is not only in behalf of my fellow editors, but in behalf of the people's constitutional right to know. I am here, in short, in behalf of the First Amendment.

The First Amendment is under attack today. It is being whittled away by a rash of court decisions, subpoenas, contempt citations, arrests and jailing of newsmen. In recent months, four newsmen have gone to jail. At least six more newsmen face jail sentences for resisting demands by courts that they betray their confidences or for having published information that judges did not want published. Within the last two weeks, the Reporters Committee for the Freedom of the Press released results of a survey that listed 30 recent cases in which subpoenas, court orders or police action have threatened what the committee calls "the free flow of news to the public."

The cases range from the use of subpoenas and jail threats to induce reporters to reveal confidential sources to a judge's order prohibiting the reporting of testimony given in open court. In all cases, the common ingredient was interference by the government with the ability of the news media to gather and publish information.

There can be little doubt that the increasing number and widening variety of such incidents stem from last year's decision by the United States Supreme Court in the case of *Branzburg* v. *Hayes, et al.*, that the First Amendment does not provide newsmen with immunity from having to reveal confidential sources and confidential information to a grand jury.

However, as you will recall, Mr. Justice White, in his opinion for the majority, virtually invited the Congress to resolve the issue when he said:

"Congress has freedom to determine whether a statutory newsmen's privilege is necessary and desirable . . ."

I would hope that you accept the court's invitation and that you agree that a strong federal shield law not only is desirable but necessary. The fact that more than a score of shield bills presently are before the Congress is an encouraging indication of the concern of the people's representatives.

That concern is not misplaced, for you will recall that Justice Potter Stewart, in his eloquent dissenting opinion in *Branzburg* v. *Hayes*: ". . . Not only will this decision impair performance of the press' constitutionally protected functions, but it will . . . in the long run harm rather than help the administration of justice."

As has been pointed out in previous testimony on this subject before committees of the Congress, immunity for newsmen from the compelled disclosure of news sources and unpublished information is not sought for the protection of the newsmen, setting them apart as a privileged class—but for the protection of their function as they serve the public.

To deny this immunity is to deny the public unrestricted access to information to which the public is entitled, for without such protection, sources would dry up. As Frank Stanton, Vice Chairman of the Columbia Broadcasting System, put it in a recent address: "Let's be frank about this. Most of the revelations that we get about government corruption or misdeeds come from someone having told the press in confidence about them. Take away the reporter's pledge of source protection—or at least weaken it by the possibility that he might have to go to jail to keep it—and you take away the willingness of most people to risk divulging information."

To carry this one step further is to emphasize the obvious. If potential confidential sources decline to provide information on government coruption for fear of being identified and subject to harassment or retribution, no newsmen will be threatened with jail because there will be no stories—or at least many fewer stories—about corruption and those in government who would betray their public trust will feel freer to do so.

The ultimate losers will not be the news media, but the people, for unexposed shortcomings and corruption can have only a corrosive effect on government and an erosive effect on the people's confidence in their government.

I would suggest, as one reporter recently did in testimony before another committee of the Congress, that we ask ourselves what kind of a nation we would be if the My Lai massacre, the Bobby Baker affair, the thalidomide horror or even the Pentagon Papers never had come to light, or indeed, if "hundreds of scandals involving state and local governments still lay locked in the mouths of citizens fearful that they could lose their livelihoods or perhaps even be prosecuted if their identities became known."

Mr. Justice Douglas in his dissenting opinion in *Branzburg* v. *Hayes* addressed himself to this point when he said "A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of government intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which various departments of government issue."

There is an equally grave danger, which Mr. Justice Stewart pointed out, when he wrote in his dissent:

"The court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society . . . The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."

As we have seen, state and federal authorities have indeed been quick to accept the implicit invitation in the court's narrow interpretation of the First Amendment to seek, through subpoenas, court orders and jailing, to convert newsmen into agents of the government.

Last September, when I appeared before a House Judiciary Subcommittee in my capacity as Chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, I said that while our organization and the committee which I represent were not committed to any bill, the ones we liked best were bills introduced by Representatives Whalen and Moorhead on the House side and Senator Mondale on the Senate side, providing so-called qualified immunity under three conditions, with the government required to prove that all three conditions prevailed before a subpoena for a newsman could be issued.

In this respect, it is interesting to note that in a survey by the Joint Media Freedom of Information Committee last fall of all candidates for the Congress, while virtually all of those responding expressed support for some type of shield legislation, many expressed reservations about the qualification that would compel the government to convince a U.S. District Court that there was a compelling and overriding national interest in the information sought from a newsman. Many members of Congress and candidates for Congress thought this qualification too vague and susceptible to too many interpretations.

This very valid reservation points up, in my judgment, the difficulty in trying to draw up qualifications that would not be self-defeating. After all, what we are dealing with is a problem that relates to the Bill of Rights, which are, in the main, not qualified rights but absolute rights.

However, in the light of intervening events, particularly the hardening attitude of federal and state courts and prosecutors, the narrow interpretation of the First Amendment in recent court decisions, and the jailing of at least four newsmen with the threat of more jailings to come, we have reconsidered our position. We now feel that anything less than an absolute immunity bill would be meaningless and ineffective and the officers and board of directors of the American Society of Newspaper Editors adopted a resolution to this effect at their winter meeting last November. The resolution reads as follows:

"Whereas the First Amendment right of the public to be kept informed has been eroded by recent court decision, the American Society of Newspaper Editors resolves:

"(1) To urge Congress to restore this right by enacting legislation to grant unqualified protection to the press in the gathering and processing of news for public dissemination; and

"(2) To urge editors and publishers to support their reporters and take the brunt of the attack on themselves in every way possible as this fight for the public's constitutional rights is continued." Most other media groups have taken the same position.

New Jersey has a shield law, but this did not prevent the jailing of reporter Peter Bridge. California has a shield law, since strengthened, but this did not prevent the jailing of reporter Farr. These examples certainly support the suggestion that a qualified protection law is no protection at all, since judges can find ways to evade the intent and spirit of any shield law written in less than absolute terms. They also suggest the wisdom of enacting a shield law that would apply not only to the federal government, but to the state as well, regardless of the existence of shield laws in a number of states.

The trouble with qualified shield laws, as experience has demonstrated, is that the determination of whether a newsman's sources are shielded is left to someone in government. This, of course, violates the basic purpose of freedom of the press, which is to make sure that no one in government—no one at all—has any control over the free flow of information to the public. Any diminution or erosion of this freedom, means, of course a corresponding measure of control over the people's access to information above their government.

It is interesting to note that the Federal Bureau of Investigation, in its report on its 1972 activities, paid high tribute to confidential informants, through whose assistance, the FBI said, 7,257 fugitives and subjects of FBI investigations were arrested, another 1,913 persons wanted for questioning were located, 644 persons were arrested by other federal agencies, 6,465 persons wanted for questioning were arrested by state and local agencies and more than $133 million in cash and merchandise were recovered, all in fiscal 1972.

This was an impressive performance. No one, I'm sure, would question, in these cases, the need for protecting the confidential informants, for in providing information usually unobtainable any other way, they provided a valuable service to the public.

Have you ever heard of any case in which a grand jury or a court has forced an FBI agent to disclose the source of such information under the threat of sending him to jail if he refused?

I submit that while the government investigative agencies and the press serve the public in their separate ways, they are mutually supportive of the public interest.

When considered against the background of the framing of our Constitution, it is sad as well as disturbing to note that it is necessary for us to have to meet here today to discuss legislation that would affirm and protect one of our basic constitutional rights. To have to seek a shield law at all is a dismaying indication of how much the first amendment has been eroded.

One of the towering virtues of the Bill of Rights, one would have thought, was that these precious amendments were so clear and absolute that they could not be misunderstood, misinterpreted or compromised. The authors of the Constitution did not qualify the first amendment. Therefore, a logical assumption has been that no court would do what the founding fathers were so careful to avoid. Since the courts have now done the unthinkable, only the Congress can repair the breach.

No part of any constitution has any meaning unless the conditions for allowing it to operate prevail without interference. An essential condition for maintaining freedom of the press under the first amendment is the protection of confidentiality of news sources and information. This is a people's right, not a right of any particular group or craft. If there is any qualification in this protection, then the first amendment itself loses meaning.

The Supreme Court has placed in the hands of the Congress the freedom to provide any type of statutory protection for newsmen that you believe necessary and desirable. I would hope, therefore, that you will support enactment of legislation reaffirming absolute protection for a right that is expressed in absolute terms in the Constitution.

In so doing you will be strengthening the freedom of us all.

Senator ERVIN. The committee will stand in recess until 2 o'clock this afternoon when it will reassemble in the same place.

[Whereupon, at 12:33 p.m., the subcommittee was recessed to reconvene at 2 p.m. in the same place.]

AFTERNOON SESSION

Senator **TUNNEY** (presiding). The subcommittee will come to order. The Subcommittee on Constitutional Rights reconvenes its hearings on newsmen's privilege legislation. We are very happy to have as our leadoff witness this afternoon Jerome R. Waldie, who is a member of Congress from California. A man who has earlier demonstrated a great deal of interest in this area. He has introduced legislation on the House side and he is one of the most articulate spokesmen in support of an absolute testimonial privilege.

Congressman Waldie, it is a pleasure to have you before this committee.

STATEMENT OF HON. JEROME R. WALDIE, A REPRESENTATIVE IN CONGRESS FROM THE 14TH CONGRESSIONAL DISTRICT OF THE STATE OF CALIFORNIA

Mr. **WALDIE**. Thank you, Mr. Chairman.

Mr. Chairman, to immediately allay any apprehensions you may have, I have no intentions of reading my statement, but I would appreciate it being submitted into the record in its entirety, if that is agreeable.

Senator **TUNNEY**. Without objection, so ordered.

[The statement referred to follows the Congressman's remarks.]

Mr. **WALDIE**. The essence of the statement, Mr. Chairman, is an advocacy of absolute privilege for confidential sources of news people and that that privilege be extended to the State authorities as well as the Federal authorities. The basis of that position is that though the legal status of the privilege was really not well understood in terms of being precisely covered by the first amendment, prior to the *Caldwell* case, it was generally understood or at least acted upon as being corollary to the first amendment, that the rights of the public that were guaranteed and protected under the first amendment could not have been fully implemented without treating confidential sources of newsmen as being covered under first amendment privilege also.

Now, there were breaches in that general rule, but they were rare, and they were unique until the *Caldwell* case, and the *Caldwell* case in essence disposed of the contention that these sources were in fact covered under the broad protection of the first amendment. I personally believe that is too bad and that I would have preferred the *Caldwell* case had held that in fact these were covered as first amendment rights and that the public's right to a free flow of information was in no way being hampered or limited by having any restrictions upon confidentiality of news sources. But in the *Caldwell* case there was an invitation to Congress to enact a privilege as broad or as narrow in scope as the Congress saw fit to enact.

Taking that as an invitation to enact a privilege that would be as close to a first amendment right as a statutorily enacted privilege can be, it was my intention to draft legislation then that would in effect provide that broad a privilege. A privilege of lesser scope, of lesser breadth, would seems to me to be inviting all sorts of litigation in terms of interpreting the language of the exceptions to privilege. And if I understand the attitude of the judiciary in terms of their sensitivity toward first amendment rights as it applies to confidential news sources, I find little confidence that that litigation would have any result except a narrowing of the scope of any such privilege Congress sought to enact by judicial legislation.

The judicial branch has increasingly engaged in activity that is seeking to limit the practice heretofore, at least, of giving protection to confidential sources, and taking into account the present composition of the Supreme Court of the United States where the ultimate parameters of whatever privilege Congress enacts will be determined. I find little confidence that the Supreme Court would change its present direction, with the four appointees that President Nixon has appointed, four out of nine, and I am afraid he will get at least one or maybe two more opportunities to appoint additional Justices to that Court. If the majority of the Justices are constituted under his standards of strict constructionists, which I think is a code word for being anti-civil libertarian and anti-civil rights. I personally find great apprehension leaving, then, to that Court the ultimate determination as to the scope of any privilege Congress should enact.

That is precisely what I think we would be doing were we to enact a less than absolute privilege. I am personally of the opinion that anything slightly less than absolute being left to the tender mercy of the judicial system would be totally less than absolute when they finally concluded their deliberations.

Therefore, for the protection of the public and their right to have a free flow of information, I think the Congress has the responsibility, Mr. Chairman, to enact an absolute privilege as closely drafted so that it might parallel the privilege that is granted under the first amendment as we can possibly do and that its application should extend as does the first amendment, to all authority that issues from government whether it be Federal, state, or local.

In conclusion, Mr. Chairman, I want to read only the last paragraph of my statement. The Supreme Court has shown it does not understand freedom. The executive branch has shown it is antagonistic to freedom. We in the Congress must show we are not afraid of freedom. And I think we can only do that, Mr. Chairman, by enactment of the broadest privilege statute we can possibly draft.

Senator TUNNEY. Thank you very much, Congressman Waldie. I have not had an opportunity to read all of your entire statement as yet. From what I have read, however, it is evidently quite comprehensive and shows a great deal of scholarship. I know that it is going to be very valuable to the committee.

I have a couple of questions that I would like to ask you. There are some that say that, if there is any qualification on the absolute privilege, it is better to have no bill at all.

What is your attitude with respect to that?

Mr. WALDIE. I share that view, Mr. Chairman, and I do it for the reasons that I stated in my most brief remarks. That though the field is uncertain and murky, given the present decisions of the Court, the uncertainty and murkiness of the field would be, I think, even greater compounded were the Congress to enact less than an absolute privilege. And I would be willing to risk the present uncertainty and murkiness absent legislation than I would to know that I would assume greater uncertainty and murkiness by the enactment of a less than absolute privilege.

Senator TUNNEY. What about legislation, for instance, that would protect confidential sources and all published material, but now I am playing devil's advocate, but which did not protect a newsman, for instance, who was off duty, so to speak, not covering a story, who happened to see a crime being committed?

Mr. WALDIE. Mr. Chairman, I would accept no exceptions including that one and that is a very good illustration of why I think exceptions are dangerous. Immediately you have massive interpretation and litigation as to what is a newsman and what do you mean "on duty." The Supreme Court has established long ago that a lonely pamphleteer on the corner is entitled to the protection of the first amendment. Any definition of any exception invites litigation that not only adds to uncertainty and murkiness. The only thing that avoids this uncertainty and murkiness or at least diminishes it would be enactment of a simple absolute privilege saying no governmental authority in America has the right to compel disclosure of confidential sources of news stories.

Senator TUNNEY. The chairman of this subcommittee, Senator Ervin, and I understand, also the Chairman of the corresponding subcommittee on the House side, Congressman Kastenmeier, have both stated that it would be very difficult to get an absolute privilege bill through the Congress. Senator Ervin last week in our hearings stated the opinion that he thought it was impossible to get an absolute privilege bill through the Congress. What is your attitude with respect to that?

Mr. WALDIE. I think it is impossible to do so if you start out with the premise of both of those gentlemen. If you start out with the premise it is absolutely certain we will get an absolute privilege bill through Congress, the chances are good, and I would much prefer starting out with that premise and if I found that my judgment was in error in that instance, as it has frequently been in the past, I would then simply drop the matter. To start out with the assumption that Congress is timid may be warranted, but it seems to me to the extent that it is not warranted you reinforce that possibility.

Congress ought not to be timid where freedom is concerned, particularly in view of the great constitutional crisis that I hear the congressional leadership discuss with increasing concern relating to the loss of freedom by the erosion of those powers that we heretofore used to possess in relation to the executive branch. When they say that particular erosion of freedom is a matter of gravest concern for Congress, and that is what we are really talking about here, if Congress is timid where freedom is concerned, then the country is probably in greater trouble than I assumed it was, and I have always assumed it is in trouble where freedom is concerned. That it really becomes in trouble when the judicial branch doesn't understand freedom, and I think the *Caldwell* case permits that assumption to be alleged. And where the executive branch is antagonistic to freedom, and there is little question that particular regard to the first amendment is involved stemming from the attack on the network news, moving up to the effort on the part of the Department of Justice to procure for the first time in history prior restraints on publication in the issue of the Pentagon Papers and the *New York Times*, going from there to the assault on the ideological content of public broadcasting, and then moving to the rash of newspaper imprisonment instituted by the Justice Department, and then finally to the latest assault on the sensitivity of first amendment by Clay Whitehead, Director of Telecommunications over at the White House, where he said local licensees shall be subject to monitoring in terms of license renewal as to how well they perform in examining content and network news that they transmitted. That is clearly a documented case of antagonism to the first amendment, not just insensitivity.

Well, if our judicial branch doesn't understand freedom, if the executive branch is antagonistic to it, there is only one branch left, and that is our branch, and I think for the leaders of our branch that the responsibility in this particular area to suggest that there are a majority of timid people in Congress where freedom is concerned, does the Congress, I hope, an injustice, but it almost assures the timidity if we start from that premise.

Senator Tunney. A thought came to mind as you were speaking about unqualified privilege and the activities of the executive branch in limiting freedom. To some extent, you would qualify the absolute privilege by defining newsmen, wouldn't you?

Mr. Waldie. No. You wouldn't have to define newsmen at all. I would define it anything beyond that which the Supreme Court has already defined it, which says the pamphleteer on the street corner is entitled to the first amendment. I would just simply leave the language as it is and assume that the Court would not change their definition of those who are entitled to the first amendment.

Senator Tunney. You would leave the interpretation or definition up to the Court?

Mr. Waldie. I can't think of a worse area for Congress to get involved in than attempting to identify who is a news person. I just can't think of a worse area for Congress to suggest that and I have even heard it proposed—absurdly it seems to me—that that will require a definition of the person working 20 hours a week for a paycheck to become a news person. Those are artificial distinctions the first amendment never encompassed. The first amendment was seeking to protect a flow of information, I think, to the public and anything that interferes with that flow of information or anything that is engaged in the process of bringing about that flow of information is protected under this the first amendment and would be protected under this privileged bill, my bill.

Senator Tunney. When I put out a press release, am I a newsman?

Mr. Waldie. Yes, sir; you would be protected under your confidential sources. If you are conveying to the public information you would be thoroughly entitled to the protection of the confidential sources.

Senator Tunney. Only as it relates to confidential sources or as it relates to all activities that I see around me? Because I put out a press release, or maybe too many press releases, say a press release every other day, would I be protected under the provisions of your bill?

Mr. Waldie. Yes.

Senator Tunney. I would be protected as to anything I saw going on around me?

Mr. **Waldie.** Yes, as far as I am concerned you would. I would assume that you are, however, a responsible individual member of our society and if there are things that you observed or were given to you in confidence, you felt were in the best interests of the Nation, you would voluntarily relinquish that privilege, but I would not permit government to compel you to relinquish that. If you were a subscriber, for example, to the ethics of the press, the canon of ethics that their association adopted in 1934, no matter what the law says, and you were to honor those ethics, you would not disclose, no matter what the condition of the law is, the canon of ethics of the newspaper association, whatever the name of the working press is, that they shall not disclose confidential sources of information. So if the laws say they must disclose it they are still confronted with precisely that by which Bill Farr, for example, was confronted with, a matter of his conscience. The law said he must disclose. His conscience said he cannot disclose and he did not. So the existence of the law, does not compel the result the law thought it would compel, when you are dealing with a man's conscience, and it does seem to me that no matter what arguable consequences may fall from the enactment of absolute privilege, and we can discuss as has been discussed ad infinitum the horrible consequences that would befall if disclosures were not made. The fact remains that nothing can compel a man against his conscience to disclose no matter what the law is, so all these horrible consequences can still exist with the enactment of any law that we pass and the failure to enact the law will not avoid those consequences if newsmen are possessed of absolutely strong conscience, and most of them, I think, are.

Senator **Tunney.** Would you include authors and scholars?

Mr. **Waldie.** Yes, I would. I would include anyone that is engaged in the dissemination of information, and I particularly would not seek, not only dissemination, the gathering for dissemination, I would not seek to narrow that definition statutorily. That is the bramble bush, I think, that will create the opportunity for the Court to enact its deep conviction which is that newsmen are somehow or other dangerous individuals whose authority and activities must be curbed for the protection of the well-being of the judicial system. And that attitude seems to me to be fairly prevalent in the judiciary and gathering momentum and it's always been prevalent in government.

You know, if you and I were to be judged, a great number of politicians would prefer that there be no news coverage of their activities other than the press releases, and if I were to be judged by my press releases, people would think I would be emotionally unstable because I am always showing shock and alarm and disturbed, but they would also conclude that I am interested only in the best causes for the most people and that basically I am a decent individual who deserves reelection because that is what I attempt to convey in my press releases, but that is neither thoroughly an accurate portrayal of the nuances of my character but those nuances were never fully disclosed by anyone other than the press, so the Government will never be tolerant of the activities of the press as they report governmental activities. But now the Court has become intolerant of the press as it reports activities in court and so when you bring the executive and legislative and judicial branches together in their intolerances now, someone has to arbitrate this situation or we are really going to have the press as an institution greatly restricted. They are the only institution that is available to report to the people what their Governors are doing to them. not for them but to them. We will tell the people what we are doing for them but the press will tell the people what we are doing to them. And I think a balanced portrayal of what we are doing must include what we are doing to them as well as what we are doing for them.

Senator Tunney. It is rather interesting to note, wouldn't you agree, that at the very time we find that there is an effort being made to restrict the freedom of the press to report what they want to report, as they see it, that there is increasing effort to protect the activities of Government from public view by the claim of executive privilege. It is a double reverse, roughly, and it is something which very deeply concerns me. I am very sympathetic to the comments that you have made. I think you have added greatly to our consideration of the various bills that are before us. I must say that I am a bit more troubled than I perceive you to be with respect to the definition of newsmen because potentially anyone is a pamphleteer, anyone is a disseminater of information, and I don't think that we could have that privilege extend to every citizen in society.

Mr. Waldie. Well, I would just say this to allay perhaps some of those fears. That that issue has always been an issue within the definition of whom is entitled to the protection of the first amendment and it's really not been a stumbling block over the 200 years we have been in existence. That has been the key to the first amendment. And I have not seen a rash of uncertainty or confusion on the part of the Court in the cases that have come before the Court. I only suggest if the first amendment does not have any great difficulty in ascertaining to whom the protection should be granted that we ought not to be any more concerned about a statutory enactment that guarantees what we are seeking to guarantee, the broadest possible coverage as consistent with the first amendment as we can. All the definitional problems that are incumbent in this concern have been incumbent within all issues involving first amendment, have not really hung up much litigation on that issue.

Senator Tunney. Except that there is much more public awareness now and there is much greater attempt on the part of attorneys in libel suits to subpena the notes of reporters, newsmen, much greater attempt on the part of governmental agencies and law enforcement officials to subpena newsmen's notes. So I think that there is a greater challenge, if you will, to the privilege than ever before.

Mr. Waldie. I think there is, too, Mr. Chairman. Partly I think there is because the Court opened the door to the challenge. If the Court had, in fact, said confidential sources are a corollary of the first amendment and are entitled to the same protection as the first amendment, none of these problems would be confronting you or me or the courts.

Senator Tunney. That is what the courts should have done, shouldn't they?

Mr. Waldie. I think so, too, and since the Court didn't do so only the legislative branch can do it and they invited us to do it in the *Caldwell* case.

Senator Tunney. Well, thank you very much.

Mr. Waldie. Thank you, Mr. Chairman.

Senator Tunney. It has been an excellent statement.

STATEMENT OF REPRESENTATIVE JEROME R. WALDIE, OF CALIFORNIA, ON H.R. 2187 AND RELATED LEGISLATION INVOLVING THE FREE FLOW OF INFORMATION AND CONFIDENTIALITY OF NEWS SOURCES

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to testify today in behalf of legislation designed to guarantee to the public an absolute and unqualified right to continue to receive that portion of news and information procured for its general benefit through the use of pledges of confidentiality to sources of information and to safeguard those general newsgathering processes which provide for the free flow of information to the public.

It is against that test, I submit, that all proposed legislation ought to be weighed. Those proposals which would give the public less than a full guarantee of continuing to receive such information ought to be found deficient.

I say, "continue to receive" because though, in the eyes of the Supreme Court, a privilege of exemption before federal grand juries for the purpose of protecting and honoring the confidential nature of news sources and newsgathering activities has not been held to exist as a corollary of the First Amendment, it is only recently that we have officially, and with any regularity of earnestness, adopted public and legal practices in anticipation or implementation of this interpretation of the First Amendment.

Prior to this, both in widespread public belief and in official conduct, we acted on the assumption that, in fact, the ability to guarantee the confidentiality of news sources was so integral and vital a part of the functions of the press in informing society that it held a de facto status as a corollary to the general and established right of society to freedom of the press, and it was not an area invaded often by grand juries, public prosecutors and other officials.

The public as a matter of course, therefore, has been able until recently to depend on access to information so obtained. As a basic and regular part of their professional function, newsmen have been able to provide such information by being able to make, and to honor, commitments of confidentiality to source of public information.

Given the general recognition of the importance to the public of this function, it was an aspect of the public's right to know that was subjected to assault in practice. District Attorneys did not, as a matter of course, demand that confidential sources be revealed. Grand juries did not subpoena newsmen in droves to demand that pledges of confidentiality be broken. Judges did not routinely jail newsmen for the act of honoring these professional pledges of protection given to sources. Providers of information to the public in confidence had no reason to believe those pledges would not be honored.

The effect of the Supreme Court decision in the *Branzburg* and *Caldwell* cases and the chain of events related to this issues has thus been to invite under that interpretation of the First Amendment, a wave of official assaults by prosecutors, grand juries, judges and others, against this aspect of the public's right to know. This recent development runs counter to the established practice in our society by which information of this kind has been guaranteed to it in the past, on which it is crucially dependent, and by which it has unarguably benefitted as a free society. The measure of that benefit perhaps may never be fully defined unless, frighteningly, that right of the public as it has existed in practice is one day eliminated and irretrievably lost, as it very nearly is under *Branzburg* and by the current spree of jailings of newsmen which our society is now undergoing while Congress considers possible remedies.

The question before Congress, it ought to be clear, is thus not whether we ought legislatively to introduce a protection in this instance of the aspect of confidentiality which has not heretofore appeared, thereby marking some new expansion in the role of the free press, possibly unbalancing the historic juxtaposition of freedom of the press on one hand and the "right to every man's testimony" by society on the other.

Rather, the question is whether we ought to preserve the sanctity of confidential news relationships and newsgathering activities which, officially and unofficially, have been respected in fact even by most law enforcement officials and agencies and courts in the past. I think it is fair to say that while attempts to compel newsmen in the fashion now contemplated by *Branzburg* have occasionally and sporadically cropped up from time to time, these occurances have usually been shortlived and frequently officials, having strayed into this area, have later retreated. Most officials and agencies did not think it wise to stray into this area and have not, until recently.

Nor, it is fundamental to note, has the Congress enacted legislation to the present moment to compel newsmen to disclose confidential sources in any circumstance, to the best of our knowledge.

As the United States Court of Appeals for the Second Circuit noted last December 7th in deciding *Baker* v. *F & F Investment* (Docket No. 72–1413), federal law on this question is at best ambiguous:

> Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg* . . . that federal law does not recognize an absolute or conditional journalist's testimonial "privilege", *neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised.*

To the extent the Congress established areas of qualification to a testimonial privilege, therefore, to that extent it would be introducing into law and with all the force of statute a requirement of disclosure which has never been clearly imposed by statute before in our history. It would be difficult to interpret such a step as representing anything other than a diminution of press freedom.

The value and importance of confidential newsgathering relationships remains recognized, despite *Branzburg*, with wide unanimity as a vital component of the public's right to know. That recognition cuts across partisan lines. Certainly the actual impact on news-gathering of any failure by Congress to enact less than a full protection is widely recognized as portending an absolute impairment of one vital source of public knowledge.

Were the Congress to enact a less than absolute protection, and enact a merely qualified protection instead, the effect would mark a clear curtailment of the public's right to know as it has evolved in practice—the more qualifications added causing a correspondingly greater curtailment.

It is dangerous business—dangerous to a free society. For how can Congress, in writing qualifications, know the extent of their accumulated weight in practice, or know when we will have passed the "Fail Safe" point for liberty of the press and for a free society itself?

At the extreme, by failing to act at all, thus allowing the *Branzburg* and *Caldwell* decisions to stand, we allow the virtual elimination of that existing newsgathering practice, which is perhaps the most crucial of all in terms of the democratic function of a free press and the public's need to know—that portion of newsgathering not dependent on, nor controlled nor influenced by, nor susceptible to, government itself.

Enactment of a merely qualified privilege on one hand, or failure to act at all on the other hand, would be inconsistent, I submit, with the absolute need to preserve a free flow of information to the public, and with the spirit—if not the recent 5-to-4 interpretation by the Court—of the First Amendment.

In laying out what I believe to be a demanding and compelling case in behalf of the enactment of absolute and unqualified legislation, there are a number of points which perhaps ought to be made by way of preface in order that the general question and problem may be viewed in the broader social context as well as in the legal and constitutional framework.

QUESTION OF CONSCIENCE

The first—and what may quite possibly prove to be the most important—consideration that ought not to escape us should be the sober realization that we really cannot, in reality and actual practice, compel newsmen to reveal the sources of their information.

It is within the power of the Congress to prescribe punishment, including the punishment of imprisonment, for their failure to do so.

But so long as newsmen are willing to go to jail as an act of conscience, there is no law we may pass or fail to pass which can force them to reveal confidential sources.

This is true even where exceptions to the testimonial privilege might be created. It might be thought desirable to make an exception for any number of plausible objectives, whether in the area of national security, civil suits, murder cases, or any number of other areas. But no exception could guarantee in actuality that newsmen could be successfully compelled to reveal that which they felt bound deeply by conscience to protect.

Our protection in such areas where we might entertain the thought of creating exceptions must still rest where it has rested in the past—with the voluntary willingness of newsmen to reveal a source if he finds the overriding public need to do so, whether to spare another human life or for some other reason, clearly outweighs the requirement to maintain confidentiality.

We would still be dependent upon that willingness whatever kind of law we passed if the newsmen conscienctiously felt in a given instance that the public need was clearly not overriding nor it superseded his pledge of confidentiality to a source.

We may well send them to jail. In the less enlightened past of the earlier years of this century, we did so for other groups whose members, out of conscience, could not perform certain acts thought at that time to be properly required on a universal basis, which failure of performance was thought to provide sufficient and ample grounds for imprisonment. Seventh Day Adventists, observing a Saturday Sabbath, were consigned to prison road gangs for the illegal act of breaking the Sunday Sabbath of non-Adventists. We filled the jails with Quakers unalterably opposed by reason of conscience and religious training to service in the armed forces, along with other legitimate conscientious objectors opposed to War, until gradually we began to understand the importance to Society as a whole of the function of the individual conscience in this free land.

We may now send newsmen to jail—but we cannot compel newsmen to reveal that which their conscience forbids them to reveal.

The code of ethics for newsmen, if not protected in English common law nor by the Court in *Branzburg*, has nevertheless been observed by newsmen for centuries, and in modern times has for the most part been universally respected. That article of conscience has perhaps deeper roots in our own country than anywhere else where freedom of the press itself is more fundamentally rooted, and in a rare way is integrated vitally with the tone and meaning of all else we hold dear in our free society.

Indeed, the very question comes to the attention of the Congress at this time not as the result of some abstract consideration of the issue or as a merely academic legislative exercise in the wake of the *Branzburg* decision, but because newsmen have, in fact, been going to jail rather than violate their canon of ethics by disclosing confidential sources and information.

A large and significant enough portion of newsmen will be unable to honor any legislative commandment to violate the ethics of their profession, just as they are proving unable in good conscience to honor the judicial commandments to do so.

It is the view, indeed, of several of my liberal colleagues, and of at least one powerful, liberal publishing enterprise in the country, that the only effective immediate recourse is for newsmen in large droves to go to jail. This influential publishing enterprise, and perhaps some others in the media, prefer that Congress *not* act, fearing that the inevitable legislative compromises which are the distinctive feature of our process can produce nothing less than a weak bill, full of qualifications and loopholes, that would render it worse than no legislation at all. I think that view is wrong.

I think it is wrong, first of all, because I think it underestimates the concern of Members with the possible impairment of the public's right to know. Practically speaking, it underestimates the responsiveness of Members in general. It is perhaps a poor example, but it ought to provide some confidence to recall the size of the vote in each body for enactment of legislation granting certain newspapers immunity from the antitrust laws under the Failing Newspaper Act. I cannot believe that we in the Congress will do less by way of protecting the public's right to information, by a similar overwhelming margin, than we did for protecting the publisher's right to enter into certain otherwise illegal commercial ventures, which indeed had, as one aspect of our motive, the preservation of a variety of information available to the public.

Finally, I think the public now understands the issue posed as a result of the willingness of newsmen to go to jail rather than violate their professional conscience, if one places faith in the findings of the Gallup Poll last December which showed that 57 per cent of the national sample believed a reporter ought not to be required to reveal to a court his confidential sources of information. Of college graduates, 68 percent believed it. I confess I was one of those in the period leading up to the recent presidential election who had no faith in the findings of Dr. Gallup. In the wake of that election, I find I am able to give a great deal of credence to the December poll on the right of newsmen to protect confidential sources.

One needs only to review the scope and variety of cases involving newsmen now under subpœna by various courts, grand juries, and other bodies to appreciate the futility of enacting a qualified bill that would not continue to result in significant numbers of newsmen finding it necessary to go to jail rather than violate their ethics by providing information in those areas where we might establish qualifications.

Predictably, as I will seek to demonstrate in a later portion of this statement, those qualifications will be further stretched by time and practice and judicial interpretation, if not by the Congress itself initially, until the number of newsmen so compelled and so imprisoned will increase, and until, ultimately, after much bitterness and social strife, and much impairment to the public, the controversy and the problem will be back with us and we will again find ourselves where we are today, namely, faced with the necessity of enacting absolute and unqualified legislation.

For in making a qualification of any kind, Congress will have placed a lessened value on that which we desire to protect. And the courts will search out their own parallels to our qualifications once we establish in law that exceptions and qualifications are meritorious in one instance, or two instances, or three, even though we were seeking overall by the total legislation to protect so fundamental a value as the right of the public to obtain information from a free press.

If one hopes to minimize the occurrence of newsmen going to jail through providing a qualified bill as opposed to no bill at all, I submit it is a forlorn hope. For such qualifications to achieve their intended purposes relating to law enforcement or some other function, they must of necessity have sufficient effect and be sufficiently broad and varied so as to almost invariably invite prosecution and imprisonment of the same type we witness now.

Moreover, one plausible exemption begets others, and both practically and philosophically, it is difficult to find a rationale which would summon one or two exceptions of narrow or little effect but exclude others of equal merit which would have so great an effect as to destroy the meaning of the protection. If we are to include only exceptions in a qualified bill which would be so minor as to preserve the privilege without defeating its purpose, why include such ineffectual exceptions? If we are to include major exceptions, why have a bill?

The list of plausible exceptions becomes too long. If we are to except where a newsman has information about a murder, why not for information about heroin pushers? If an exception is to be made for civil suits, why not for cases where a reporter has information relating to "national security"? Or information relating to any other vital function of society? And once we have excepted from the bill those areas where society or government or the courts or legislatures plausibly might have reasonable interest in obtaining confidential newsgathering information, there is no longer any area vital to the public's right to know where a reporter can function in a free and unfettered atmosphere, and there is no longer a function even worth trying to protect by legislation of this kind.

Each person who brings thought to bear on this legislation can offer his own plausible exception to the protection. Each exception has surface merit. The rationale which would justify one equally justifies a dozen others. But we lose sight of that which we have set out to preserve and protect—which is the free flow of information to the public. If that is worth protecting and as critical and fundamental as we believe it to be in a free society, we must resist those exceptions which, though plausible when weighed in a vacuum, have not seemed required in our past experience in all the years when we assumed a de facto protection of confidentiality existed already, and which would weigh the bill without necessarily accomplishing the purpose of the exceptions, and which, in any event, I do not believe an understanding of reality and sense of balance would lead us to believe are really required.

However carefully drawn or intentionally limited, such a qualified bill will in fact increase the number of such imprisonments. For just as an army of zealous prosecutors, grand juries, judges, and other officials poured forth from the open floodgates of *Branzburg*, suddenly aware of their powers in relation to the press, so, too, qualified legislation would represent a legislative invitation to vigorously proceed without reservation against those newsmen falling within the necessarily broad categories of qualification. The number of cases would multiply. The number of newsmen imprisoned would increase.

SOCIAL IMPLICATIONS

But perhaps the greater casualty to the public at large would be the continuing warfare and strife over this issue involving the news profession and those on whom they report as public officials, creating in the country at large the appearance, aura and climate of a war of repression against the media; if not in law or by law, at least in chilling belief. The strife and agonized confusion would continue until this question of confidentiality would again have to be put back into the perspective in which it originally existed, back in the time when we proceeded as a society to act as if such an exemption and right already did exist in practice.

The confrontation will plague us bitterly under a qualified privilege no less than in the absence of any legislation at all; it will plague our society as bitterly as it will affect those newsmen actually sent behind the prison walls; and it will plague us in the Congress. More importantly, that confrontation would itself impair and restrict the right of the public to information until resolved, and shake our public faith and confidence in our own liberties in ways which we, as a society, and particularly right now, can well do without after these last 10 years of national discord, dissension and strife. Thus, permitting the emergence of a class of media martyrs, as the large publishing enterprise earlier referred to suggests as the only acceptable remedy, allowing newsmen to go to jail in droves, has scarcely more merit for society than for the newsman, and certainly not as a gesture of anticipation that we in the Congress will prove unwilling to find a more secure and meaningful remedy.

As the ultmiate recourse of a free press attempting to serve a free society, it may have great merit. And I sadly have no doubt it will come to pass if the Congress either fails to act or enacts only a statute that is qualified and not absolute. For whatever the qualifications written, the problem of conscience for the newsman remains. Little, still, is to be gained at this point from the standpoint of the news profession itself by using the last resort of a free press as its first resort. What is it that cannot be attempted legislatively now that martyrdom will achieve later? And where would such a campaign of arousing public concern lead but back to the Congress where the issue is already presented? And is either the Congress or the media really ready yet to consign the distinguished former Majority Leader of the United States Senate, the Hon. William F. Knowland, now publisher of the Oakland Tribune, to prison for refusal to identify sources of information should he be compelled to do so, and as he has indicated he would not do?

I, at least, am not prepared to conclude that Congress is not yet ready to fulfill its responsibilities to the public by preserving its right to the free flow of information. Should I misjudge the Congress in this respect, and should a qualified bill emerge as the only legislative possibility, the media still has the option of collectively requesting a presidential veto. Should the bill still be enacted, it retains the final option of doing what it wishes to do now—allow its reporters to go to jail in droves, something, clearly, they are individually prepared to do in any case—hoping that as a consequence the public might better understand the issue and bring its weight to bear in behalf of its own right of access to information.

THE DIVIDED COURT

There is a corollary view to the scenario envisaged by those who believe no bill at all and widespread jailing of newsmen might be preferable to enactment of a qualified statute. It is that the Court is so closely divided on the issue, by a 5-to-4 vote, that the arousal of passions over a threat to press liberty which might result from widespread imprisonment of newsmen might change the climate in which the Court might then have occasion to reconsider its opinion. Justice Powell is thought of as the swing justice in this long-range hope. It is imagined that the result on a reconsideration of the issue might be different.

This is a view I think those who entertain it would do well not to entertain, and which a careful reading of the dissenting as well as the majority opinions in *Branzburg* ought to quickly dispel. The dissenting opinion written by Justice Stewart and joined in by Justices Brennan and Marshall offers no more hope of an early construction of the First Amendment to permit an absolute exemption for the purpose of preserving confidentiality of news sources than does the majority opinion written by Justice White.

The division in the Court, broadly stated, is between those in the majority who believe not even a qualified privilege exists in the instant cases by virtue of the First Amendment, and those in the minority who believe a qualified—but not an absolute—exemption should be recognized, with Justice Douglas alone arguing for the existence of an absolute privilege as being required by the First Amendment.

In terms of affording an absolute privilege, the division on the Court is in actuality, therefore, eight to one—not five to four.

Moreover, the *type* of qualified privilege urged by Justices Stewart, Brennan and Marshall, as spelled out in the dissenting opinion, provides no grounds for encouragement to those who hope for an early or even eventual shift in opinion on the Court and prefer to await such an eventuality rather than trust the will of Congress in this matter.

For the qualifications those in the dissent on the Court would impose require the government to show "there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law," that it "demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights," and that it "demonstrate a compelling and overriding interest in the information."

These were the very tests applied by the Court of Appeals for the Ninth Circuit in *Caldwell* and overturned in the majority opinion of the Supreme Court. They are the same tests applied in some of the qualified legislation pending in Congress to which the media rightfully exhibits gross apprehension. Even in the Supreme Court dissent, the caveat is added: "This is not to say that a grand jury could not issue a subpoena until such a showing were made . . ."

Thus, for the news profession, even the minority's test, if adopted by the majority of the Court and implemented, offers no comfort. For in any serious inquiry by a grand jury, public prosecutor or other agency which is not merely frivolous or designed to harrass, the elements required by the test might reasonably be found to be virtually always present and therefore applicable to the cases involving newsmen which are the cause of our consideration of legislation in the first place, and which cases have already sorely demonstrated the crying need for action to preserve the free flow of information to the public.

The criteria of the qualifications that even those in the minority on the Court would impose are in reality so broad as to be almost self-fulfilling. Assuming a newsman, relying on a confidential source, writes a story bringing to light a previously unknown illegal activity, the knowledge of which is limited to perhaps the confidential source and those persons perpetrating the illegality, the fulfillment of the minority's test would almost flow from mere publication itself of the news story under the reporter's by-line.

Thus, publication of the story would be sufficient to demonstrate the reporter "has information which is clearly relevant to a specific probable violation of the law." Existence of only a single, unidentified confidential source as the initial basis for the story pointing to wrongdoing might be sufficient to warrant the conclusion that the information sought by the government "cannot be obtained by alternative means." And the possible illegality suggested in the news story itself surely is sufficient, as the Court held it to be in *Caldwell*, to "demonstrate a compelling and overriding interest in the information" on the part of law enforcement agencies.

Moreover, and of critical importance, only the government can really know what "alternative means" might or might not be available to it, or whether it is acting out of genuine necessity or mere convenience. The reporter, moving to quash, is in the dark. The judge is in the dark.

That the continuation or even exacerbation of the problem we are considering with respect to confidentiality would remain inherent and unresolved, even with the granting of a conditional privilege such as spelled out in the dissent, was well recognized and stated by Justice White in the majority opinion, as follows:

"Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.

* * * * * * *

"In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters' appearance: Is there probable cause to believe a crime has been committed? Is it likely the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege.

"Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not others, they would be making a value judgment which a legislature has declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths."

What the concurring opinion of Justice Powell offers, considered in the light of a 5-to-4 opinion, is an expression that *some* First Amendment right attaches to the gathering of news and that state and federal authorities are not free to "annex" the news media as "an investigative arm of government." But as the concurring opinion would seem to make clear, Justice Powell awaits cases involving wholesale "harassment of newsmen" or grand jury investigations that are being conducted in "bad faith" to move any further. The sentiment, while offering something, really does not address the present situation or offer any remedy. For the cases which have raised the issue to our attention almost exclusively involve those in which public officials have proceeded in good faith and, quite legitimately from their viewpoint and the ends of law enforcement to be served, to seek such information from news sources.

It is worth pausing to reflect that in the one case of notoriety in which such harassment may have occurred and such "bad faith" been present, that of the Caldwell case, Justice Powell did not see it, and the majority found no bar to an open-ended fishing expedition among Caldwell's notes and tapes, in the process striking down the test urged in the dissent and which in fact had been applied by the appellate court which ruled in Caldwell's favor.

In sum, those who prefer to hope that a changed climate might produce a reverse decision by the Supreme Court, and those in the media who therefore wish to forego the risk of a qualified privilege emerging from the Congress instead of an absolute one, have little to look forward to, in my opinion. At best, after a decade of public dissension and the jailing of innumerable reporters, they might obtain from the Court, at most, the same qualified privilege they are fearful of obtaining from Congress.

CONGRESS IS ONLY RECOURSE

If there is to be an absolute privilege, as I believe there must be and as the news profession obviously feels there must be, it is only from this Congress, and not from the Court, I submit, that an absolute privilege can practically be obtained, whether now or later. Moreover, I believe it can be obtained now, because I believe the public necessity for it can be overwhelmingly demonstrated, and because I have some faith in my colleagues on issues of overriding bipartisan concern involving the structure itself of our free society and its balances.

It should be equally apparent that the view held by some that Congress ought not to enact legislation because, "What Congress gives, Congress can later take away," is not a view that offers any constructive hope of remedy for the situation that presently exists, either now or at any point in the determinable future given the 8-to-1 character of the opinions which were handed down by the Court on the question of an absolute privilege.

To argue that Congress ought not to be invited now to enact even an absolute privilege because it may at some point in the future qualify it is a futile and self-defeating exercise, it seems to me, which leaves us with no constructive solution at all to the problem that exists. It may well be that it will take "eternal vigilance" to preserve an absolute privilege if it is enacted now. But I suggest that what may be lacking now is "present vigilance."

At the same time, the fact that Congress can later modify and alter its work in an argument, I believe, for Congress to begin initially in legislating on this historic question by enacting the strongest, not the weakest protection. To enact an absolute protection now would be most in keeping with the spirit of the First Amendment we have so zealously safe-guarded historically. If experience proves there really is a need to include exceptions to the privilege which have not appeared to be required in the past even when a protection of confidentiality was honored in practice, we can later amend. But why begin the effort to preserve a free flow of information, now threatened, by enacting the most feeble protection in consequence of our concern over the assault on the spirit of the First Amendment? To enact less than clear and firm protection while maintaining that we can always, later, restore more freedom and more of what was lost in *Branzburg* if we wish, is to fundamentally misunderstand freedom itself I believe.

The future is never the time to ensure freedom.

Past experience with honoring confidential newsgathering relationships has given no such compelling grounds for apprehension as seems to suddenly exist, nor does it fulfill the more creative fears now summoned by imaginative hypotheses that unless we make innumerable exceptions to a privilege, reporters will not tell us about imminent nuclear attack as learned from a confidential source; that innocent men will go to the gas chamber while reporters stay silent; that Mafia chieftains will begin writing books to obtain the privilege from testifying (in addition to the Fifth Amendment privilege) and that all other manner of horror to society will occur. Experience has been the opposite. An unfettered press has instead functioned to positively preserve and safeguard all the other values of our society.

In approaching its historic work, Congress should err on the side of preserving that which we have known and that which has worked, and err on the side of preserving liberty—not on the side of diminishing it in ways that could represent a loss forever.

This is perhaps the appropriate place to clearly indicate that it is a problem for Congress to face as much or more than the media. It is obviously understandable that with the imprisonment of reporters, the media is immediately concerned and affected in the most extreme way. As professional newsmen concerned professionally with getting information to the public, it is equally understandable that the media wishes to find appropriate means to continue to guarantee their capacity to do so.

But, in the final analysis, it is not, as they recognize, *their* rights individually that are of paramount public interest, but the right of the public itself to the continued free flow of information. It is therefore peculiarly up to those of us in the Congress, as constitutional guarantors of liberty, to act in behalf of the public right to information whether certain elements in the press think it to be untimely in a political sense, misguided in a legislative sense, unnecessary in a constitutional sense, or in any specific form, undesirable in a substantive sense.

The same answer addresses itself, I believe, to the reservation expressed by some Members of Congress that we ought not to act when the media itself is divided over the desirability of legislation and when a consensus as to the particular form of legislation among those who do favor it has not yet emerged.

In the last month, I believe a consensus has in fact begun to emerge and that it is behind the effort to enact absolute, unqualified legislation. The American Society of Newspaper Editors, which had previously regarded the prospect dubiously, has now moved to support enactment of an unqualified privilege. Similarly, Sigma Delta Chi, along with spokesmen for the electronic news media and Dr. Frank Stanton of CBS, and many others, have now called of enactment of the strongest bill possible. I believe this shift will continue and that the consensus will become even greater.

But whether it does or not, the answer must still be that such a consensus is not relevant to the fulfillment of our responsibilities in the Congress, on whom falls the requirement of moving now to protect the right of the public to the free flow of information. That is the compelling and transcendent need we must now act to guarantee as coequal custodians of liberty, whether certain large publishers rise to the challenge threatening this public right as quickly and clearly as one might wish or not. And I am not persuaded that certain large publishing ventures and media corporations have responded, at least initially, as courageously as we might have wished or expected, or even as have those individual newsmen who chose jail rather than violate their conscience and canon of ethics.

It is perhaps understandable that the attorneys in the *Branzburg* and *Caldwell* cases before the Supreme Court did not even raise the issue of an absolute protection afforded by the First Amendment, though briefs filed by the American Society of Newspaper Editors and others did make the case. It is understandably incumbent on an attorney, nevertheless, to raise that defense which best accommodates itself to those areas of case law offering hope for the most favorable possible verdict on behalf of clients who are threatened with imprisonment. Less understandable has been the appalling timidity with which the editorial boards of certain large newspapers have reacted, a timidity exhibited, oddly, by some of our most powerful, most wealthy and most ostensibly liberal publishing ventures, rather than by the countless medium-sized, less powerful and presumably less liberal of our daily and weekly newspapers throughout the country. Whatever the explanation may be for the diverse response on the part of the media, it is similarly irrelevant to our responsibilities. It is for us in the Congress to preserve and protect the free flow of information and the liberties of our people whether those in the media are slow or quick to move to protect those same liberties, whether they are divided or together in pursuit of the remedy.

In fully understanding our responsibility and the public need that impels enactment of an absolute privilege, I think we would do well to ask the significance to be attached in the event we do not do so and the practical result proves to be other than the fears to which I have given voice.

Alternative possibilities do exist to the prospect that large numbers of our newsmen might face the threat of imprisonment.

DIMINISHED NEWS

One alternative is that they will not in fact end up in prison. Perhaps large numbers may comply with the mandates of the law and public agencies and reveal confidential news sources which, in time, will dry up, cease to exist, or otherwise become unavailable for the enlightenment of the public. Or newsmen may simply avoid the choice imposed between their conscience and the law by no longer undertaking the vigorous and robust investigative role they have in the past. Or sources themselves may determine the issue by no longer making information available to the press. Most likely, all these eventualities will occur in combination.

Under any of these alternatives, the public loses—perhaps far more than if our prisons, in fact, became filled with newsmen who, at least, performed the function of continuing to get information to the public on their way to jail, and even as their yet-unjailed fellow reporters continued to perform this vital function, if in ever-dwindling numbers.

If the prospect of filling our jails with newsmen is properly thought to have a "chilling effect" on freedom of the press, the absence of newsmen from those same jails in compliance with wholesale summonses to produce confidential information might properly mark a permeating narcosis in the stream of information consciousness to the public, a pall and slumber that would pose a danger to our liberties of immeasurable extent.

For we in the public would no longer know, after a time, what and how much we did not know. It is sufficient to illustrate the case to note how little we in the Congress knew for years about our growing involvement in Southeast Asia, and still do not know. Not until publication of the Pentagon Papers did we begin to suspect the extent of the official misinformation that had been given us and the extent of our own ignorance, step by step, as we helped contribute blindly towards the creation of that tragedy. The result of wholesale termination of investigative reporting would be, domestically, to plunge us all into the same dark ignorance over our own public affairs at home, be it in the Nation's capital or in the small towns and villages across this country; while those in power and with official responsibilities retreated further and further from accountability; and public policies, increasingly forged by a few, unknown to the many, profoundly shaped and determined our lives at home and shaded the future of liberty for generations.

As long as newsmen continue to go to jail, we will at least know what we would have lost had they not done so. At the moment they, in compliance with our failure to enact anything less than an absolute privilege, stop going to jail—either because their sources no longer exist or because they choose the law over their conscience—at that moment we begin to descend together as a society into the vacuum of powerlessness at home to match the powerlessness we have experienced in trying to extricate ourselves abroad.

While some newsmen might comply with the mandates of the law, there is little doubt that many others will, in fact, go to jail. The canon of ethics enacted by the American Newspaper Guild in 1934 reads as follows: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court of before other judicial or investigatory bodies, and that the newspaperman's duty to keep confidences shall include those he shared with one employer after he has changed his employment."

The final remaining alternative is perhaps the most fearful of all. It is that, in any event, we will prove not to care.

TYPES OF INFORMATION

It is necessary, I think, that we all fully understand the scope of the kind of public information we are talking about which is at stake in our consideration of legislative remedies, as well as in our appreciation of the broader social implications which would result from our failure to enact absolute protection of confidential newsgathering relationships and activities.

The following summary, compiled through the energetic and exhaustive efforts of my distinguished colleague in the other body, Senator Alan Cranston, is worth inserting even in this already lengthy statement at this point because of its extreme importance and direct bearing on these questions. Senator Cranston, who has sponsored in the Senate the same legislation I have introduced in the House in behalf of an absolute privilege, has compiled the information in an effort to illustrate the kinds of stories investigative reporters write or broadcast, the results of those stories, and the true beneficiaries—the public. KNX Radio in Los Angeles, explaining that both their news and editorial departments rely on confidential sources, lists some recent editorials which they say would not have happened without a confidential tip to start with. These editorials included:

An illegal appointment to the City Planning Commission.

An alleged financial flimflam behind the Los Angeles Convention Center.

The details of a land swap that suggested a secret deal between city hall and an oil company.

The unfair and illegal destruction of a park.

The exploitation of a tribe of Indians by some judges, lawyers and a major bank.

The parking ticket mess that jails innocent people in Los Angeles.

The beating up of a student editor by the UCLA student body president.

The threats made against police officers by a group of professors.

The attempt by an Assemblyman to create a new Assembly district for one of his friends.

In its first full year of operation, the *Boston Globe's* four-man investigative team published reports that resulted, among other things, in:

119 indictments against 27 people, including three former city mayors and a city auditor;

Passage of legislation requiring the State Turnpike Authority to put all projects out for competitive bidding;

A probe of scandalous land speculation in another Massachusetts city by the District Attorney's office.

Newsday conducted a three-year investigation and expose of secret land deals in eastern Long Island which led to a series of criminal convictions, discharges and resignations among public and political officeholders in the area.

The recent CBS Special, "The Mexican Connection," revealed narcotics smuggling practices which enabled the government to more effectively curtail those practices.

Two reporters and a photographer for the *Philadelphia Bulletin* exposed collusion between police and numbers racket operators.

David Burnham of the *New York Times* exposed widespread police corruption in that city and initiated the present department-wide cleansing of criminal influences.

It was newspaper stories that produced the clues that led to arrests in the Yablonski murder case.

The Riverside (Calif.) *Press-Enterprise* won the Pulitzer Prize a few years ago when it exposed corruption in the courts in connection with the handling of property and estates of a local Indian tribe.

And here is a five-year record of revelations of widespread corruption in government by the *Los Angeles Times*, revelations which, in the editors' own words, "depended heavily on the trust placed in Times reporters by hundreds of news sources":

In 1967, an investigation of a proposed World Trade Center on Terminal Island led to a grand jury inquiry and the indictment of four commissioners.

In 1968, an investigation of the Recreation and Parks Commission resulted in the indictment and conviction of a commissioner.

In 1968, an investigation of the Rapid Transit District led to the indictment of two men who had arranged the sale of surplus equipment at a cut-rate price.

In 1969, an investigation disclosed that a Los Angeles city planning commissioner and the city planning director had joined a group of developers and had bought land for speculative purposes on the site of a proposed airport at Palmdale.

In 1969, an investigation disclosed irregularities in the Beverly Ridge Estates development financed by Teamster Union pension funds in the Santa Monica Mountains.

In 1971, an investigation disclosed waste and mismanagement in the development of the Queen Mary as a maritime museum.

And last June, an investigation disclosed speculative land investments based on inside information by Anaheim's city manager and public works director who played key roles in planning public works that boosted the value of their property.

EFFECT OF SOURCES

Similarly, it is vital to understand the chilling effect on the ability of newsmen to obtain such stories which is already resulting from the absence of any guarantee of confidentiality.

William Thomas, Editor of the *Los Angeles Times*, cited just one such instance in a recent speech reprinted in the newspaper Dec. 24, 1972:

"After literally years of trying to find a businessman willing to tell in detail how he did business with a public agency, we persuaded one to do so as a public service. Anonymously, of course, for he wanted to continue to be a businessman.

"Two weeks ago, long after this story was published, he called me and asked if these stories about the judges and newsmen's sources meant he faced the danger of retroactive identification. He was serious, and he was afraid.

"Do you think this respectable man, and others like him and others not so respectable, will ever tell what they know to a newspaper again? And if they don't, do you think that you will ever hear through any other avenue what it is that they have to tell you?

"At the time of the riots, can you imagine the people of Watts talking frankly with us about their troubles with the police, or educators talking candidly about the schools there, to mention only a few, if they knew we might be forced to publicly identify them?"

The following example was cited in an article by Mark R. Arnold carried in the *National Observer* of Dec. 30, 1972: "CBS wanted to interview a 'cheating welfare mother in Atlanta for a network White Paper on public assistance. Producer Ike Kleinerman agreed to disguise her voice and appearance. But the woman, fearing prosecution, demanded a pledge that the network would not divulge her name if supoenaed to do so. Kleinerman called CBS's legal counsel in New York and was told the network couldn't guarantee to protect the woman's identity. The interview was cancelled."

As Pulitzer Prize-winning reporter William Jones of the *Chicago Tribune* notes: "Anonymity is essential. It is frequently the first question asked by a potential confidential source in the first telephone conversation. If you can't guarantee it you will probably never hear from the source again."

From just the foregoing, minor sampling, it takes little imagination to realize and appreciate that the variety and scope of public information subject to loss in a climate where confidetial sources can no longer be protected cuts across virtually every other interest of a free society, in all of its activities, and in which the need to know and to possess this kind of information is an absolute requirement to remain functioning as a free society.

There is no way selectively to qualify which kinds of information must remain free to reach the public under pledges of confidentiality, and which may be dispensed with in order to serve some other public purpose. To even attempt to draw such distinctions, judicially or legislatively, is to bring down the whole structure, which, antithetically, is exactly what the phrase "free flow of information" means, and what it is.

It is for this same reason that Harvard Law Professor Paul Freund was moved to observe that: "It is impossible to write a qualified newsman's privilege. Any qualification creates loopholes which will destroy the privilege."

The ambiguities of interpretation and application alone would prove endless and destroy the privilege.

As Senator Cranston noted in his previous testimony before the subcommittee: "A pending Senate bill would deny the protection in cases where there is "a threat to human life". . . But what constitutes a threat to human life? Is bad meat sold to the public a threat to human life?"

The erosion alone of successive judicial interpretations would prove sufficient to erase the meaning of any privilege.

It was stated well, I think, by Justice Douglas in his dissent in the *Branzburg-Caldwell* decision: "Sooner or later any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all. As Justice Holmes noted in *Abrams* v. *United States*, such was the fate of the "clear and present danger" test which he had coined in *Schenck* v. *United States*. Eventually, that formula was so watered down that the danger had to be neither clear nor present but merely 'not improbable'."

Given all this, one might still not press the case for enactment of an absolute privilege, if it could be convincingly shown that some equivalent gain in some other aspect of the public good might be served through compelling newsmen to reveal their confidential sources of information and newsgathering activities.

But it has yet to be shown what other right might be protected, or what public gain might be achieved, that would not also disappear in proportion to the speed with which news sources disappeared under threat of exposure and as the press ceased to have access to them.

It is important to note at this point that the effect of eliminating the confidentiality of sources on the ability to procure information has not been seriously contested, and was not contested in the *Caldwell* or *Branzburg* cases. The government has not argued that the imminence of sources drying up claimed by the news profession is erroneous. There is no contention this will not occur or is not occurring. Rather, the government in these cases has, in effect, merely asserted it wants the information, anyway, so long as it is available, however short a time that may be, simply because it is entitled to it. I is further content to rest on the simple insistence that newsmen, like other citizens, are required to provide information on criminal misdeeds before federal grand juries just like other citizens, the view also preferred by the majority of the Court.

The public policy implications of the government's position—and of the opinion of Justice White, in writing for the majority—defy comprehension. For the limited period of time in which the prosecution of some offenders might be enhanced through the forced testimony of newsmen before the value disappears as the newsman's confidential sources disappear, we are asked to permanently give up the value to society as a whole that comes from the free flow of information. In the end, we are left with neither the benefit of the confidential news source we force reporters to identify, nor the news stories which previously would have resulted by permitting that relationship of confidentiality to continue.

It is axiomatic that if confidential news sources dry up, newsmen no longer have either the investigative brand of reporting which contributes so basically to a free society nor the testimony to contribute to grand juries which resulted from their reliance on confiedential relationships. Law enforcement is no longer enhanced—and a vital component of public knowledge and dialogue is obliterated.

LAW ENFORCEMENT

The inescapable conclusion at this point is that both the objective of law enforcement and the necessity of preserving a free flow of information to the public are no longer met and that we are poorer on all counts than had we preserved the confidentiality of news sources. For presumably, even prosecutors, police departments, grand juries and judges, as part of the public, need to know and remain aware of those cross-currents of information and discourse affecting all aspects of the public life of the community which is the peculiar function of investigative reporting, based on use of confidential sources and independent newsgathering activity, to provide. It is to the advantage of law enforcement officials, also, to remain free to read newspapers articles describing the inner workings, motivations, plans and personalities associated with, for example, the Black Panthers. Absent the general flow of such information to them as to the rest of the public, can it be seriously suggested that the overall competence and ability of law enforcement is anything but diminished by lack of such regular knowledge? Can it be seriously maintained that a random use of reporters' testimony in a given case, or a dozen cases, prior to the disappearance of reporting based on pledges of confiedentiality, could ever be weighed favorably against the general loss of all those various kinds of information which perhaps led in the first place to the very case in which the newsman's testimony was compelled, and to scores of others where it was not?

As Senator Cranston persuasively observed:

"Once you make an exception (to the privilege), say an exception for murder, then it is highly improbable that any informant having information about a murder will talk to a newsman—or to anyone else—if that informant wants to remain anonymous.

"But if the protection of anonymity is absolute, then people who have confidential information about a murder will continue to come forward and will continue to provide useful information leading to the prosecution and conviction of murderers."

Again, one has only to review the scope and variety of the kinds of investigative stories which regularly appear exposing illegality, corruption and criminal wrongdoing in places both high and low, in the variety of our institutions, public and private, and affecting society across the board in relation to almost any pursuit, to appreciate the quite possibly irreplaceable aid to law enforcement provided by a free and unfettered press. To restrict this flow of information would be to leave law enforcement officials no less than the rest of us increasingly ignorant and uninformed about what is taking place in society and in our communities and, specifically, ignorant of the wide range of illegal activities regularly brought to our attention not by police departments in the first instance, but by the press.

To obliterate this irreplaceable aid to the general objectives of law enforcement in order to secure, for a short time, random testimony from newsmen in a few isolated cases, would be a loss to law enforcement in general for which it would appear impossible to compensate.

We cannot, quite obviously, predict the full effect of a failure by the Congress to act, or of the enactment of a merely qualified statute which would, in its effect on confidentiality of sources, be equivalent to inaction. But we know the effect can be nothing other than great and, most impotrantly, that if we wait to act until the pall is upon us and the damage done, some portion of our loss will prove irretrievable, and for possibly a very long or permanent length of time.

As Justices Stewart, Brennan and Marshall noted in their dissent:

"The deterrence may not occur in every confidential relationship between a reporter and his source. But it will certainly occur in certain types of relationships involving sensitive and controversial matters. *And such relationships are vital to the free flow of information.*

"To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await on unequivocal—and therefore unattainable—imprimatur from empirical studies. We can and must accept the evidence developed in the record, and elsewhere, that *overwhelmingly supports the premise that deterrence will occur with regularity in important types of newsgathering relationships.*

"Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, *valuable information will not be published and the public dialogue will inevitably be impoverished.*"

Despite these findings, it is nonetheless argued by some, apparently with seriousness, that, even so, reporters ought to be compelled to testify simply to make them subject in this instance to the same requirements imposed on all citizens. Some, perhaps understandably, might find a sort of perverse, Puritan or even political satisfaction merely in insisting that reporters be made to behave just like everybody else, and regardless of the broader social consequences that might result from a sharp diminution of the free flow of information to the public. I suggest we cannot afford the indulgence of such feelings if we find any serious merit in the preservation of a free and democratic society.

There are others who make this same argument, minus such perverse motives, and who genuinely find it objectionable to permit an exemption for confidentiality of sources. They note that the right to freedom of the press is not "absolute" and properly note the requirements of balancing conflicting rights. This in essence is what the majority of the Court in *Branzburg* held when it stated: "The public has a right to every man's evidence."

GRAND JURIES

But if freedom of the press is not an absolute, in conflict with other rights held by the people neither, as Justices Stewart, Brennan and Marshall pointed out, is the power of the public, through the grand jury, absolute to compel "every man's evidence." As they stated it:

"Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rules has been limited by the Fifth Amendment the Fourth Amendment, and the evidentiary privileges of the common law. So it was that in *Blair*, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that "some confidential matters are shielded from considerations of policy, and perhaps *in other cases for special reasons a witness may be excused from telling all he knows.*

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association.

Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them.

Moreover, as the majority opinion iself noted: "The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may asset a privilege against disclosing the identity of these informers."

The distinction the majority finds between the protection of the confidentiality of police informers, apart from the fact it is only a qualified and discretionary privilege, and between the protection of confidential news sources, is that:

"The purpose of the privilege (for police informers) is the furtherance of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (*Roviaro* v. *United States*, 1957)." And:

"There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his."

I wish I could find this view anything other than naive and insensitive to the realities of our society as its exists and to how the press actually functions in a free society, because it is frightening, at least to me, that this naviete could exist on the level of the Supreme Court of the United States. I confess to reacting with a sort of freedom of speechlessness to the view enunciated.

Of course, one would always prefer to imagine as the Court does, our public officials and law enforcement agencies cast in a role as sensitive protector of the fate of confidential sources of wrongdoing, fully as able as the press to safeguard them and, also, as elected or appointed officials, able to act as the true agents of the public in determining the balance that ought to exist in any given instance between the right of the public to depend on confidential information from informants for its flow of information and the other rights of society against which that right is to be balanced.

But what of the example of, let us say, the young patrolman with knowledge of widespread corruption in his precinct or department and who, being fearful for his job and possibly for his life, turns to a newspaper reporter to make that corruption known in return for a pledge of anonymity? How many articles have we all read by investigative reporters exposing burglary rings operating in some of our major metropolitan police departments, or large-scale pay-offs reaching even to higher ups in the police department, or into a district attorney's office, or a mayor's office? If we are that patrolman, uncertain of the honesty perhaps even of his superiors, and certain of retaliation by other officers, perhaps some not even known to him, to whom does he carry his story, knowing that in safety and anonymity, he can make the existence of this corruption known to the public?

I am afraid he does not, in Justice White's antiseptic view, "risk placing his trust in public officials" of whose honesty he may be gravely apprehensive. He goes to the press. At least, he does so now. In the absence of the press, I think he goes to no one.

This is the second aspect in which the free flow of information provided by the press serves law enforcement, I think—as a check and balance within our society against the abuses by law enforcement officials themselves and by others holding public trust.

It cannot be thought that the public administration of justice would have been served had not sources within police departments over the years, under a pledge of confidentiality, provided the basic information by which newspapers have exposed widespread corruption in major metropolitan departments with all too frequent and frightening regularity.

The effect achieved by those who would have us cease to guarantee the confidentiality of sources of news would be to terminate also that check and balance on the administration of justice, when there is very evidence we need desperately to preserve it.

Moreover, either in law or in practice, we have recognized for good reason and sound purposes of public policy other exceptions to the rule that. "The public has a right to every man's evidence." And despite an overriding and compelling public need that demonstrably and unquestionably justifies compulsion of citizens in other ways, if considered only in a limited context, we have nonetheless recognized the value of exemptions to otherwise-universal requirements of the law.

Thus, considered alone and only in its own context, the public indeed superificially might appear to have an overriding need and right ot certain information which may be in the possession of newsmen.

Yet, to take an example of a completely different context, perhaps no greater need or national interest existed in World War II than to compel every able bodied man to come to the defense of the country, under mortal attack. Even in that critical hour, however, when the nation labored for its very existence, we recognized the validity and importance of an exemption from combat for conscientious objectors—an exemption provided not so much for their benefit as for the importance in a larger way to our own society, even under attack, of preserving and respecting the quality of individual conscience and the broader substance of liberty.

Surely, in some cases, it might be said an overriding public interest would justify compelling a wife to testify against her husband, a priest against the penitent, the lawyer against his client, the doctor against his patient, or the defendant against himself—and I note that the Supreme Court is at least remaining consistent by its issuance of the revised rules governing federal courtroom procedure in which some of these ancient privilegs also appear destined to be wiped away unless Congress acts. These privileges may have been variously founded and thereby variously applied. But there is no question but that there is attached to these relationships a special character even within the functioning of the processes of justice, to one degree or another, ranging from the absolute mandated by the Constitution to the dispensation merely observed in usual practice. The point remains that, however founded, and with whatever degree of observance, we recognize in principle the value and importance to society of certain exemptions for the benefit of other and broader social values. They involve the very texture and fabric of the kind of society to which we aspire and presume, and we weigh these considerations apart from the immediately pressing requirements of law enforcement or judicial process.

Certainly the public interest in preserving the free flow of information is of sufficient importance to place a privilege involving the confidentiality of newsgathering and sources of information into this category. Neither is the concern insubstantial in contemplating the effect on society and on the free flow of information by futilely attempting to use the law to compel a regular violation of the profession canon of ethics and the individual conscience of newsmen, on a wholesale basis, in order to serve an altogether new function for the purposes of law enforcement, which until 1969 did not seem to be required to fulfill its objectives. To use the machinery of the judicial and law enforcement processes now in these new and uncharted directions, impinging on the functioning of confidential newsgathering relationships and activities, is to inject into our society a requirement at odds with newsmen's conscience, putting that exercise of conscience by newsmen against the requirements and power of law and government, with no rational expectation of public gain and with the certainty of immeasurable public loss.

If it is said that law enforcement will crumble unless we compel newsmen to violate their conscience by providing information sought by the state, it was also maintained during World War II that this country would succumb unless conscientious objectors were made to fight. But we did come to recognize the genuine demands of conscience of certain objectors. The country did not succumb. Neither will law enforcement in our country crumble if it cannot have access to confidential newsgathering information on a scale it has never either required or had in the past, or unless it can routinely jail reporters who, by reason of their canon of ethics and as an act of conscience exercised on behalf, not of themselves, but of the public, refuse to betray their sources of information or the integrity of their function as newsmen.

There are two remaining areas in considering an absolute privilege which trouble even some sympathetic with the purposes of such a statute, and these involve the impact on the laws of libel and on the rights of criminal defendants.

AREA OF LIBEL

Considering the area of libel first, I think we need to separate in our consideration those libel actions arising out of cases involving nonpublic figures from those arising out of cases involving public figures, and where the Supreme Court decision in *New York Times* v. *Sullivan* stretched the permissible limits of published comment involving public figures and correspondingly laid down a requirement that "actual malice" be proven by the plaintiff as the requirement for a favorable verdict.

It seems to me in the first instance that the question involving the proposed privilege does not arise, or, if it arises, that it does so to the detriment of the newsman who might find himself the defendant in a libel action brought by a non-public figure and where the tests of *Sullivan* are inapplicable. Where his defense still rests with a showing he acted truthfully, with good motives and for justifiable ends, the reliance his defense may need to place on confidential sources remains a matter for his own conscience and possibly his instinct for a favorable defense verdict.

In the cases to which *New York Times* v. *Sullivan* would be applicable, however, the example is raised in which a public figure is burdened as a plaintiff by the necessity of demonstrating actual malice by a newsman, and that the only means of proving that actual malice may be to require the disclosure of confidential sources and/or to subpoena newsgathering materials. The issue was directly raised most recently in *Cervantes* v. *Time, Inc.*, 464 F. 2d 986 (8th Cir. 1972, cert. den. Jan. 15, 1973.) The point is made that it might be extremely difficult for a plaintiff to obtain a favorable verdict in the absence of an ability to compel disclosure. In some cases, this might be true.

Yet I think it is important not to lose sight of the basic fact that the very purpose in *Sullivan* intended by the Court was to make it more difficult for public figures to obtain relief, the justification being the necessity to maintain the freest possible flow of information to the public regarding those who, by virtue of being public figures and willingly accepting the burdens of office or other social responsibility, function in a democratic dimension which requires greater subjection to the vagaries of exposure, speculation, commentary and public judgment.

Those who feel enactment of an absolute, unqualified privilege for newsmen would place an impossible or unfair burden on plaintiffs in the *Sullivan*-type case overlook the present state of the law in such libel actions involving newsmen. That state is ambiguous at best. But under the ruling in *Cervantes*, it is clear that even at present and without the proposed absolute, unqualified shield bill that a plaintiff does not necessarily have a right to obtain confidential information from the newsman against whom the suit is brought in an effort to meet his burden of showing actual malice unless he can make "a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice."

The reasoning of the Court was that: "(t)o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."

However much the plight of public figures might arouse the empathy, sensitive concern and sympathetic regard of those of us who are Congressmen, the concern expressed in this area does not seem to me to have such validity as to overweigh, either in scale or principle, the compelling need to preserve the public's right to the free flow of information and which requires enactment of an absolute privilege.

I suggest, in fact, that much of the concern over enacting an absolute and unqualified shield law which does not carry an exception for the libel area really reflects a concern with the consequences of the various court decisions in *Sullivan* and in *Cervantes*, together with perhaps a lack of appreciation also of the current state of libel law, which well insulates under *Cervantes* the newsman from whom information would be compelled; for the burden the plaintiff must meet under *Cervantes* in the effort to compel such disclosure is really as difficult and arduous as the need to show actual malice in that he must first show by substantial evidence that "there are strong reasons to doubt the veracity of the (undisclosed) defense informant or the accuracy of his reports." 464 F. 2d at 994.

We ought not to use this legislation as the vehicle to respond to our concern, if it exists, with the complex issues growing out of the specific decisions reached by the courts in the libel area where newsmen are involved. It seems well agreed among legal experts on libel that if we do not include a provision dealing with libel in this bill, the present libel laws as interpreted and applied still pertain and the newsman still must answer to the suit brought alleging libel, and the current court findings applicable to disclosure still apply. Congress ought particularly to be wary of including language which could have the effect of making confidential sources even more open to compelled disclosure than the courts presently would do in light of the constitutionally protected function attached to newsgathering. Our intrusion in this area at all would very likely, in my judgment, have that effect, and I would think that would not be our intent.

If it is correct, as many maintain, that the definition of public figure is now so broad as to include just about anyone whose name appears in print, the remedy, I suggest, lies in altering the laws dealing with libel or by some action, through changing the burden or standards of proof required or other means, narrow the applicability of the *Sullivan* tests to those who legitimately ought to have to make a greater showing by virtue of being public figures in [illegible] genuine and originally intended sense.

To attempt to deal with the question, instead, in this legislation, designed to respond to a particular problem, and designed to preserve the ability of the press to provide a free flow of information to the public, would be as undesirable as it would unwieldy, very likely defeating the purpose of the legislation itself.

For to grant an exemption in this bill for cases of libel would do far greater damage even than the fact it would, for the first time, and again with all the force of statute, lay down a requirement that confidential sources be disclosed more absolute and unrecognizant of the newsgathering function to be protected than even the court in *Cervantes* has done.

It would, in addition and instead, invite any public figure embarassed by an expose, perhaps, of his official conduct and anxious to find out who provided the information exposing him, to simply bring a libel suit and thereupon demand the identity of the confidential source. Thus an exception for the libel area perhaps more than in any other in which exceptions are proposed would effectively wipe out, with the broadest possible stroke, the meaning of any legislation. It would destroy—not preserve—the confidentiality of newsgathering relationships as would nothing else. Its impact would be more adverse than *Branzburg*. It would go further than Congress has ever gone and in a negative way. Because, as the United States Court of Appeals for the Second Circuit recognized in *Baker* v. *F & F Investment*, supra, in denying a motion to compel disclosure by a journalist in a civil action, an absolute *positive requirement* of disclosure does not presently exist in federal law. With the enactment of an exception in this legislation for such civil areas, in my judgment, such a positive requirement would, for the first time, then exist.

I do not believe that is what even those concerned with the impact on libel cases intend. But I believe that would be result of making such an exception.

Moreover, grave doubt as to constitutionality would exist, I believe, were the Congress to compel disclosure in any qualifications it included in ways beyond what the courts have already held might be compelled by virtue of the First Amendment nature that attaches to newsgathering and which affords it special protection, including, as indicated in *Cervantes*, protection under some circumstances for confidentiality.

Congress, therefore, confronts complex constitutional questions wherever it might seek to limit the shield or specifically delineate exceptions. They are questions, in my judgment, Congress need not confront, and ought not to confront, in this legislation. What it ought to confront is the clear constitutional suitability, as the majority found it to exist in *Branzburg*, to enact a shield law for the purpose of protecting the free flow of information.

I would urge that we are better on all grounds to adhere to the simplest bill possible if it is to meet the objectives which prompt it in the first place, and not try to deal in this bill with the variety of contemplations such consideration provokes which do not need to be dealt with in this bill, either because those situations are already dealt with in existing practice or law and would remain unaffected, or because the apprehensions which provoke some of the proposed apprehensions are unfounded either in law or fact.

Another major area, however, needs to be discussed.

IMPACT ON DEFENDANTS

The rights of defendants and hypothetical negation of them asserted by some persons who, I believe, misjudge the meaning and effect of the proposed absolute shield bill, nevertheless troubles many and perhaps some liberals the most.

In the hypothetical extreme used to illustrate, an innocent man is about to be convicted of murder and sentenced to death and actually executed. Only forcing a newsman to reveal confidential sources and/or producing confidential newsgathering materials can save him. Enactment of an absolute privilege, ergo, would doom the innocent man to death.

It seems to me there are several reassuring answers to this.

One is that it stretches the imagination, I think, almost to the breaking point to conceive of a newsman so conscientious and dedicated to the ethics of his profession and the society he serves that he will, in one instance, go to jail rather than betray his oath of confidentiality to a news source; but who, in the hypothetical example, is suddenly so absent of conscience that he will knowingly allow an innocent man to die rather than voluntarily, having weighed the respective rights of all concerned, make information available that will spare our hypothetical example the fate of undeserved execution.

Nothing in the enactment of an absolute statute, it must be stressed, bars the voluntary disclosure of sources by newsmen where the need is overriding and compelling, whether in this hypothetical instance or in any other instance, nonhypothetical.

A second answer is that one has to weigh against the hypothetical example the quite-clearly unhypothetical example of hundreds, or perhaps even thousands, of instances in which a free investigative press, relying on confidential sources, has in fact saved innocent persons convicted by the state for a variety of offenses of which they were, in fact, innocent, and who might not have been spared absent the ability of the press to rely on confidential sources. I submit it takes far less imagination to picture the future innocent person convicted of murder and his fate once the confidential sources on which the press relies no longer exist.

Finally, the hypothetical innocent defendant is not without legal recourse in the eventuality that testimony thought to have substantial bearing on the question of guilt or innocence was excluded by invocation of a privilege. The same legal processes remain open to him as in all other cases where a privilege against disclosure is invoked and which prevents testimony thought to be crucial, such as in the recent cases in which the government elected to drop charges rather than disclose confidential security information in its possession, or where a motion for directed acquittal or declaration of mistrial is in order.

CONSIDERATIONS IN DRAFTING

The task remains of considering the specific language and scope of legislation to enact an absolute and unqualified privilege, and of some of the pragmatic considerations which weigh on us as legislators who must address the general question of the degree to which refinement of any statute we draft ought to be left to the courts, and the degree to which we can safely depend on the use of legislative history to assure compliance with the statute as intended, and the degree to which we cannot so depend.

I suggested we ought not, in the light of recent experience, leave much to the legislative history that is really properly substantive, but that we ought to make the provisions of the statute itself unmistakably clear in its applications.

It came as some surprise, I know, to my distinguished colleague from California who authored the Freedom of Information Act, Congressman Moss, and who has always been clear that the exemptions provided in that Act insofar as secrecy classifications are concerned were open to citizens' challenge and subject to judicial review, to read the recent Supreme Court decision judging them beyond the scope of review because of the Court's peculiarly unique reading of the legislative history. The result of that particular decision has been, in large effect, to turn what was initially a Freedom *of* Information Act into a Freedom *from* Information Act; and a piece of legislation drawn to open the doors of the executive branch to the light of public scrutiny, is transformed into a vehicle for shrouding it ever deeper in the darkness of secrecy.

We ought not, in this awesomely vital and particularly sensitive task, to make the mistake in this instance and with this particular Court of relying on legislative history in the place of clear statutory language.

In the judicial area, I concur with the majority in *Branzburg* that presiding judges in trials and grand jury proceedings ought not to be asked to make finite value judgments and applications case by case. Enactment of an absolute statute would virtually remove this cause of apprehension. But in addressing the question generally as we weigh the matter of legislation, I think there are additional reasons not to leave these fine distinctions and areas of interpretation to trial judges, and one of those reasons lies in the despairing account carried in a lengthy *Los Angeles Times* editorial of Nov. 29, 1972 of some of those fine distinctions drawn by presiding judges in the area of the First Amendment already:

—A Monterey County judge not only restricted the release of information to the media but removed the press and the public from the courtroom while the censorship order was argued. Furthermore, he forbade public complaints about the order.

—A New York justice barred the public from a criminal trial.

—The secret proceedings ordered in a court in Ventura County were so bizarre that an appellate court commented: "In the present case, it is startling to see the evils of secret proceedings so proliferating in seven short weeks that the court could reach the astonishing result of committing a citizen to jail in secret proceedings, could contemplate inquisitorial proceedings against the newspaper reporter for reporting this commitment, and could adopt the position that the district attorney, the chief law enforcement officer in the county, was prohibited on pain of contempt from advising the public that someone had been sent secretly to jail . . ."

—A Superior Court judge in Los Angeles County attempted last August to enforce direct censorship. He ordered the media (an order that was appealed) not to print or broadcast anything relating to a murder case except proceedings in court, over which, of course, he exercises direct control.

—A Superior Court Judge in Los Angeles prohibited any comment on a pending case by the county, its sheriff and district attorney, the City of Los Angeles, its chief of police and Board of Police Commissioners. His assertion of power was so broad that a writer on legal affairs stated, "Thus a single judge in a single community felt it appropriate to . . . assume the role of the Legislature, the Supreme Court, the executive head of local government, the promulgator of rules of professional conduct, and, most importantly, a censor of speech."

—Another judge, in a flight of imagination, named the district attorney, the sheriff, the chief of police and the police commissioners of Los Angeles as "Ministers of Justice," and declared, as such, that their "speech is peculiarly subject to judicial control."

—A Baton Rouge, La., judge ordered newspapers not to publish news about the trial of a civil rights case.

—An Arkansas judge ordered newspapers not to publish news on the verdict of a rape trial.

—(The State Court of Appeal) waived aside a California law that protects the confidentiality of news sources (in the Farr case) and said it regarded such laws as "an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers."

And finally, a San Andreas, California judge cited a local newspaper publisher for contempt for writing an editorial critical of the fact the judge had personally filed a complaint against his neighbor for allowing a black Laborador retriever to stray into his garden—and then presided over the owner's pretrial hearing. Such newspaper editorials, said the district attorney in support of the judge's contempt action, "tend to embarrass the administration of justice and bring discredit upon the court."

I would counsel the appropriateness of recalling these incidents in each and every instance where proponents of legislation affecting newsmen suggest to the Congress that certain ambiguities of scope, coverage, application or definition be "left to the courts to work out."

STATE PREEMPTION

The question of state preemption poses a separate issue even if agreement exists on the desirability of a federal statute. The question involves two parts: Can the Congress extend a testimonial privilege to the States? And should it as a matter of public policy.

The weight of opinion seems to be clear that Congress does possess clear and ample authority in this area, either under the Commerce Clause, or under the authority of the powers given it under the First Amendment and under the Privilege and Immunities, Due Process and Enforcement Clauses of the Fourteenth Amendment.

But in addition, I believe it is sound policy. Newsgathering has unquestionably become interstate in dimension. To require reporters crossing state lines to learn the varying protections offered or not offered in each instance by state statutes and restrict their reliance on sources accordingly is to place a burden on newsgathering which I think would be severe in impinging on the public's right to know.

The case is conclusively made, it seems to me, when one considers the situation that would obtain if a federal statute, designed to preserve the free flow of information and confidentiality of sources, is enacted but not extended to the States. Such a dichotomy would have the same effect to a large extent as failure to pass a federal statute. For it would place an impossible burden on newsmen and confidential sources alike to determine when and if and how a protection or an exception might be applied in a given instance. To impose the need on a newsman to inform sources he might safeguard their anonymity under one circumstance but not another could scarcely have any other effect than to chill those relationships and diminish the willingness of sources to provide information.

Again, as Justice White recognized: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.'"

It is the certainty of protection that makes the relationship possible and brings the information to light. To protect those relationships if the result of a newspaper expose leads to a federal proceeding, but not in a state proceeding, is really to render any supposed "protection" problematical in the extreme.

Thus, the purpose of a federal statute could be defeated by the failure to extend to the States. If Congress may act on the federal level to guarantee an overriding public interest to the free flow of information, it cannot be seriously held that Congress cannot also move to protect that federal interest where failure at the State level would negate the federal interest and render it ineffectual or meaningless. To do so would be to argue that the States may veto and annul overriding federal interests which are undisputed.

EXCEPTING CONGRESS

The same logic and reasoning applies to the question of granting an exception for congressional committees as to any other major exception. It would render the protection meaningless in that neither newsmen nor sources could safely predict when anonymity would be guaranteed.

It could not, in fact, be guaranteed.

Moreover, in none of the states which have enacted some form of shield law—an absolute law in a dozen of them—are legislatures excepted.

The Congress ought not to prove more retarded than the states in this regard in moving to preserve the free flow of information to the public.

To do so would be an invitation to the remaining states which have not yet acted, and to some which have, to extend a similar exception to the protection to state legislatures.

The privilege, for all practical purposes, ceases to exist when such vast areas of inapplicability are created.

SCOPE OF COVERAGE

Finally, there remains to be considered the central questions of who ought to be covered by a statute and whether the privilege ought to attach to confidential information gathered, in addition to the protection of sources, and to what extent.

In addressing the first question, I believe we are not altogether free in writing legislation to make our own determination as to whom the privilege will apply, or in our definitions of those in the newsgathering profession, but that we are constrained by already-established constitutional boundaries.

While it is argued that Congress would be enacting a testimonial privilege within its discretion and can make it as "narrow or broad" as it deems appropriate, and that it is not dealing directly with the First Amendment or attempting to defined newsmen in those terms, the connotation of he majority in *Branzburg* should remain clear.

It employed the phrase "as narrow or broad" in reference to the permissibility of fashioning "standards and rules"—not with specific reference to the fashioning of any definition of "press". Justice White earlier suggests, in fact, that doing so is a questionable procedure . . ." Moreover, the majority later makes reference to "First Amendment limits" in discussing even the fashioning "standards."

The essential point for the Congress in defining the scope of coverage, therefore, is that by precedent the Court has already historically ruled time and again as to who, in effect, is "press" and therefore falls within the scope of certain First Amendment protections which put them beyond the reach of the Congress, the executive branch, or the states, in fashioning legislation.

For Congress to extend a testimonial privilege, the obvious legislative purpose of which is to affect the press function and to promote, as we say, "the free flow of information," but to exclude from such legislation and such a privilege any the Supreme Court has time and again ruled are entitled to the general press protections afforded by the First Amendment, would appear an exercise of obvious constitutional dubiousness. For in fashioning a privilege for "press," Congress would be in the position if it writes exclusions to the privilege of saying some are *not* press whom the Supreme Court has already held *are* constitutionally protected as such. There would seem to me to be the gravest question of the power of the Congress to do so. Moreover, I do not believe it is required where the Supreme Court has, in effect, by precedent, determined the constitutional areas of protection under the First Amendment right of freedom of the press. The definitions, I submit, have already been made, and with a constitutional force the Congress in writing statutory language is not free to ignore.

In discussing the difficulties of enacting federal shield legislation, Justice White noted: "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, *a questionable procedure* in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photochemical methods."

But it is later, I submit, and it is necessary to extend protection to those to whom the privilege will apply. I find it a questionable procedure, however, only if we attempt to make the exclusions Justice White seems to assume quite naturally have to be attempted from purely a pragmatic standpoint. And it is a puzzle for me that he apparently feels such difficulty exists when that assumption seems to me to run thoroughly counter to the very words he goes on to recite:

"Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' (*Lovell* v. *City of Griffin*, 1938.) The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, politcial pollsters, novelists, academic researchers and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury."

Unlike Justice White, I am not alarmed at the prospect of an all-inclusive application of the privilege, possibly because I do not foresee a national spectacle of poets, dramatists, pamphleteers or streetcorner mimeograph machine operators appearing in waves to invoke the privilege before grand juries anxious to unmask the confidential sources of Tennessee Williams, the mystical inspirational sources behind the poetry of James Dickey, or the faceless housewives who talk to Dr. Gallup.

Moreover, should we reach the day when grand juries do start probing the confidential sources of Dr. Gallup, Tennessee Williams or James Dickey, my conclusion is that I would want them to have that privilege to invoke.

I do not know how many lonely pamphleteers there are passing out their mimeographed handouts on streetcorners who rely on confidential sources of information or perhaps other voices unheard by the rest of us. But I think if a grand jury in all sobriety summons them before the bar of that tribunal to identify those voices, we ought to include those lonely pamphleteers in the protection extended by the privilege.

The point of the proposed statute is to protect the confidentiality of news sources and news gathering as it exists in experience and this is where the impact of any such statute is required and will apply.

If, in experience, it applies on occasion to those Justice White might conclude ought not to be deemed part of the respectable press, as he thinks of the press, and even though he recognizes them as press under the First Amendment, I could only refer Justice White back to his own words: "Liberty of the press is the right of the lonely pamphleteer who uses carbon paper of a mimeograph just as much as of the largest metropolitan publisher who utilizes the latest photochemical methods."

The question of whether the privilege ought to attach to information gathered as well as to the confidential source is a separate question in drafting legislation. But there is no way from either a rational standpoint or a practical one that I am able to separate them under a privilege. One inevitably leads to the other, and in modern times "confidentiality" in effect may embrace, in its vital contribution to newsgathering, even the refusal to appear before a grand jury, as in the case of *Caldwell* (given a need related to the requirements of a specific set of confidential relationships and a given story) to the necessity of a TV film crew to know they can film unharmed in a neighborhood because the residents understand they are not functioning as an annex to law enforcement agencies, which is the same reason we have successfully discouraged the practice of FBI agents posing as newsmen.

I am perhaps most disturbed by those who suggest such a separation can be made and ought to be made, and that we should limit the scope of the privilege to only those instances involving protection of confidential sources and where the explicit promise of confidentiality was made—and to no other aspect of newsgathering.

To do this would be to open the door, under sanction of federal statute, to an all-out assault against all the remainder of newsgathering activities we would be leaving unprotected and which have even been mostly respected and sanctified, by experience at least, in the past.

One suggestion has been that the test of who is entitled to the privilege should be whether the person involved, the lecturer or author, is a person to whom somebody with information is apt to go. If he is not, the Court will rule that he is not entitled to the privilege.

I would suggest that the test is whether the person involved under the broad definition of the press is someone to whom somebody with information does go.

For what we are attempting to protect is the transmittal to society if the information, and it is the source, and it is the free flow of information broadly to the public by whatever means of published or broadcast communications, not the "newsman" as such. And the purposes of preserving the free flow of information are served no less when an author, lecturer, or a pamphleteer makes that information public, relying on a confidential source, than if it is done in the largest newspaper or on the wave of the most powerful television signal.

In the end, as Senator Cranston suggested, actual experience sorts it out. *Those with information to give really go to those they think have professional reasons to receive it.* But the privilege ought to—and I believe constitutionally must—extend to the *event* of the confidential information as transmitted to anyone lying wihin the broad definition of "press" under the First Amendment, and not be left vague to impose upon the courts the burden of deciding the "aptness" of the newsman receiving it on some imagined hierarchy of journalistic power or respectability.

And if the privilege also embraces the "newsgathering activities" of the lonely, streetcorner pamphleteer no less than of our publishing empires, I think the country might survive that expression of freedom of the press, and perhaps even profit by it. Because, as Justice White himself suggested, that is what freedom of the press is all about, and the lonely pamphleteer can serve the public right to know in a given instance no less than CBS.

SUMMARY

It is an easy exercise for imagination and fancy to conjure up even the most grotesque hypotheses which really, boiled down, symbolize a fear of freedom. It is not new. It is the ageless question. It is a normal human and legislative instinct. Potential abuses of freedom may always be summoned to mind. They will always, in reality, exist. But I thought we had learned in this country, of all countries, that if we consult only our fears and apprehensions that those apprehensions exist in every area of liberty and can be used to end liberty itself on the most plausible and convincing grounds at any time we wish to succumb to an instinct that regards freedom more suspiciously than we do government.

There is little in the way of possible abuse I can conjure up if we enact an absolute, unqualified, all-inclusive statute beyond what has existed potentially in all our past history of actual experience, when news-gathering was treated with the sanctity we are seeking merely to restore. Rather, our experience to date does not provide reason for apprehension, but confidence.

If we wish to consult only our imagination and our fears, we may find any number of exceptions to the privilege and which will destroy the privilege.

If we wish, instead, to consult our history and the evidence of our own free society to date, we cannot act other than to reaffirm the freedom that is our only meaning and our only real strength as a society.

If we cannot feel that spirit within us anymore in drafting this legislation, then let us quit.

It is not a partisan concern. It seems at some times partisan in tone because the particular issues raised by initiating the practice of subpoenaing newsmen have occurred under this administration, but they might as easily have occurred under any other. And if the spokesmen for the administration defend that practice, others in that same party, including the Governor of my own State of California, Governor Reagan, do appreciate the threat to the free flow of information to the public-inherent in removing the protection of confidentiality.

The move to provide a remedy is bipartisan and not partisan. The issue is skeletal in terms of basic liberties, relating to the structure of balances that exist and the threats to them that can arise under any administration and in any political or social circumstance. It is in the recognition of this fact that the remedy will be found and will rest. But it is worthwhile, nonetheless, to appreciate the particular responsibility that now falls to us as a result of these events: "The Supreme Court has shown it does not understand freedom. The Executive branch has shown itself antagonistic to freedom. We in the Congress must show we are not afraid of freedom."

Mr. Richard Wald was scheduled to appear next, but he is stepping aside so that Mr. William Thomas, editor of the *Los Angeles Times*, who has to catch a plane back to Los Angeles can testify. Mr. Thomas is accompanied by Robert Warren, counsel, Mr. John Lawrence, who is the Washington bureau chief of the *Los Angeles Times*, and Jack Nelson, who is a reporter for the *Los Angeles Times*.

I would like everyone to know that these gentlemen are appearing voluntarily and not under a subpoena. It is a pleasure having you with us, Mr. Thomas.

STATEMENT OF WILLIAM F. THOMAS, EDITOR, LOS ANGELES TIMES, ACCOMPANIED BY ROBERT S. WARREN, ATTORNEY AT LAW; JOHN LAWRENCE, CHIEF, WASHINGTON BUREAU; AND JACK NELSON, REPORTER

Mr. THOMAS. Thank you, Senator. If it is all right I will read a brief statement from the point of view of the newspaper and then Mr. Warren will read a brief statement from the point of view of a trial lawyer over the past several years in this area. We are here, obviously, to support legislation we think is needed if we are to function effectively. We are aware of the arguments of those who fear that such legislation may turn out to be double edged, but this sounds to us like a drowning man who rejects a rescuer because of possible future entanglements.

We are in trouble right now, deep trouble, and it's clear from the succession of pyramiding court rulings that things are going to get worse.

By now I'm sure you've heard the general arguments for press freedom and the right to know often enough. I'd just like to tell you, then, what's been happening to us in recent years.

We have become a lawyer's grab bag. As the courts continue to enlarge earlier rulings that we are susceptible to being hauled in to testify, and that the fruits of our reporting efforts may also be obtainable, we have been under constant siege.

Even lawyers who orate on behalf of a free press come running to us with a court order or the threat of one when they need help, because we're the most visible and tempting resource.

We are subpenaed in every conceivable kind of case, and we never know where the assault is going to come from.

One of our political reporters was subpenaed a few weeks ago in a sordid civil suit involving one of the candidates in an election months earlier. He was subpenaed simply because he wrote a somewhat cursory story about an incident involved in the course of the campaign and might know more about it.

Another subpena threat came 3 weeks ago as the result of a minor story which appeared more than a year ago in one of our suburban sections. It concerned a disgruntled grand juror, and a defense lawyer thought our reporter might have run across information in writing the story that would shore up his attack on the grand jury selection process.

In the past few years, the *Times* has been served with more than 30 subpenas and threatened with more than 50 others. So far we've successfully resisted all of them, but the cost has been high.

Our efforts in this area alone total more than $200,000 in these few years, the vast bulk of it in the past year. Even for a wealthy paper, this is big money. And it should be clear to anyone that small papers cannot long resist at these prices.

So what happens? They stop printing stories that could cause them legal problems, and sources—clearly perceiving that all this means their confidentiality rests upon an increasingly frail reed—stop giving information to all of us.

I'll give you just a few specifics, and John Lawrence or Jack Nelson can add to them if you'd like them to.

After trying for more than 7 years to find a businessman courageous enough to spell out the cost and methods of doing business with a local government, we found one.

With his anonymity assured, and after literally months of persuasion, he told of blatant bribes and more subtle gratuities he was forced to give public officials to do business.

His canceled checks and the public records confirmed his story, which was printed about a year ago. It produced some immediate reforms in planning practices, which we can hope will last a while, but more than that, it produced an acute and vivid idea of how corruption really works.

A few months ago, long after the story was published, that man called me. With what's happening in the courts, he asked, can they retroactively force you to identify me?

He wasn't kidding, and he was afraid. That man, and others like him, will not talk to us again. And our readers will be the losers.

Some other specifics: Two of our recent Pulitzer Prizes were for stories which were not possible without confidential sources. One went to a series of stories which exposed corrupt practices in city and county government, and which rested upon information given to us by respected businessmen and public officials who stood to lose livelihoods if they were identified.

Today, they would not talk to us.

I think it's important to realize that by far the bulk of confidential sources are respectable businessmen, public officials, lawyers, and the like.

They are impelled to provide information for a variety of reasons, but usually because they are basically honest men who are offended by what they see happening or who want to help make a story true and meaningful.

But they also are the kind of people who have a lot to lose if they are named—lawyers who would get in trouble with the judge, judges who would get in trouble with fellow judges, businessmen who would lose business with the public agencies they are telling us about.

And, since the courts have made it clear that their guarantee of confidentiality rests upon a newsman's willingness to go to jail and a newspaper's willingness to fight long and costly court battles, they are remaining silent.

At least four times in the past few weeks, potential sources in Los Angeles have specifically cited the danger of subpena in refusing to provide information we both knew they possessed.

It has happened at least twice to our reporters here in Washington.

These were people candid enough to admit their reasons. But most of our confidential information comes to us unsolicited. If our known sources are refusing to talk to us for admitted fear of disclosure, we wonder how many unknown sources now just stay away, or how many others plead ignorance when the honest explanation is fear?

So there is no question in our minds that our sources already are dwindling, and that the courts are the reason.

Another thing is happening. Stories are not being told because the media itself is becoming gun shy. We know of a metropolitan newspaper which told its reporters not to even try to talk to anyone bound by a judge's gag order.

Since that includes everyone who might know anything about what is happening in any given case, this means the newspaper is reporting only what is can see and hear in open court. Russian reporters can do the same.

We do not advocate gratuitous violation of any judge's order, but if we no longer even keep track of what is going on behind the scences in his court he can run his so-called public institution any way he wants to.

In another case, a judge's suppression of a grand jury report became public only when it finally reached the attorney general's office, which ruled he couldn't do such a thing.

Checking back to see why this had been such a deep secret, we found that the important media in that county—print and broadcast—had declined to publish anything about the affair for fear of the judge's gag order.

There are, of course, other more subtle examples. It would be asking too much of human nature not to expect some to take the easy way out when the alternative could be jail or crushing expense, or both.

It is for these reasons that we think we must have a strong shield law if we are to survive in any meaningful form.

And by "strong," we mean a law without crippling qualifications. We ask this not out of arrogance, but out of bitter experience.

The trouble with qualifications is that they are interpreted by judges with the widest latitude. "Clear and present danger," for instance, can mean many things. One judge out our way found a clear and present danger to fair trial in stories about a young man's wearing of the flag on the seat of his pants.

A judge here in Washington found that the *Los Angeles Times* in a taped interview probably came into possession of material which would not be found elsewhere and which met the tests of relevance even though: first, he had no idea what material we had beyond what we published, and second, the subject of the interview had been interrogated by the grand jury and the FBI and transcripts were available.

So it's clear that any qualification, reasonable as it sounds, is subject to the judge's interpretation. And the result, is the same: we wind up in court.

And even though a bill with qualifications may give us a ground on which to appeal, a valuable thing to lawyers, so far as we are concerned we lose the big battle when we are hauled off once again to court.

It is this that serves dramatic notice on anyone who might have something to tell the public that he'd better keep quiet unless he's willing to put his name to it.

I realize that to many, our request for a law without strings may appear unreasonable. But I think we must remember that, with all our admitted faults and frailties, the press and broadcast media represent the public's only avenue of information, for all practical purposes, except agencies and people directly involved in whatever it is they need information about.

We cannot be even as effective as we have in the past if our present vulnerability is continued through strings in the law.

Thank you. I would like to mention that we are going to offer some affidavits for the record which we won't go into.

Senator TUNNEY. Good.

Before questioning Mr. Thomas, I think we might listen to the other witnesses that you have with you at the table. I must say parenthetically that I find your statement extremely valuable but at the same time very disturbing. I am shocked quite frankly to hear you say that you feel that a number of very important stories have not been published because of fear on the part of newspapers and the fear on the part of confidential sources, particularly if these are stories relative to corruption in government. After all, by its very nature, men in positions of power tend to become corruptible if they do not have to be judged by the public that they are suppose to be serving. You don't need an ancient axiom to understand that. Just keep your eyes and ears open and see what is going on around you to understand that even a person of the most faultless character—if he is not going to be held accountable—can be corrupted.

Mr. Thomas. Yes.

Mr. Warren. Mr. Chairman, gentlemen, my name is Robert S. Warren. I am with the law firm of Gibson, Dunn & Crutcher.

Since 1965, I have been privileged to represent the *Los Angeles Times* in many of its litigation matters. During the first few years of that representation, the litigation problems of the newspaper were minor; however, within the last 3 to 4 years, the situation has reached a stage which I think legitimately can be described as a crisis.

As Bill Thomas has testified, litigants in civil and criminal matters have discovered that the investigative and reporting functions of newspapers fit in handsomely with the factfinding process involved in court proceedings. As a result, each year produces an increasing number of subpenas directed to *Times* reporters. Subpenas for trial testimony and for depositions. Subpenas almost always issued and served on very short notice. Subpenas directing the attendance of the reporters and commanding the production of notes, photographs, background materials, all articles published on a certain subject, and so forth. The service of these subpenas compels immediate involvement of legal personnel, forced negotiations with counsel involved, prompt runs to the courthouse for protective orders, and eventual submission of motions and authorities as to the ultimate issue. As a result of the situation, we have been compelled to prepare a legal brief on computerized typewriter tape, constantly being revised to accord with the latest judicial decisions on the subject.

Further, in California, we are laboring under a system of judicial control of news respecting criminal justice which now approximates the English system. A system which, according to the 1941 decision of the U.S. Supreme Court in *Bridges* v. *California*, was expressly intended by the framers of the Constitution to be rejected in the United States. This has been achieved by the use of two devices. The first is the issuance of so-called gag orders by which the court in a pending criminal case regulates the speech not only of court personnel, nor even just the litigants and attorneys before the court, but also all witnesses, all law enforcement personnel, and in many instances, other officials such as the mayor of the city—in other words, all likely sources of news respecting the crime and criminal proceeding. When these orders first evolved in the latter half of the 1960's, the press was assured that the judiciary was simply "putting its own house in order" and the press would not be affected. The use of the second tool—namely, interrogation of the reporter to discover his source of news—has made an illusion of that assurance. For now, as dramatically illustrated by the *William Farr* case, the California courts claim the right to interrogate a newsman as to whether a source of his information respecting a criminal proceeding was a party subject to a gag order and to jail the newsman if he refuses to breach the confidence. By these two exercises of authority, the California courts do indeed claim the power to control with an iron hand the disclosure to the public of information respecting the workings of criminal justice.

We believe that our experience in California sheds some light on the consideration of the prospective bills before you.

First, it is truly essential that the protection afforded be applicable in state courts as well as in Federal courts. If a news source is subject to being identified in a State court proceeding, the fact that his identity would be protected across the street in the Federal courthouse is going to afford him little comfort. He will not reveal the confidential information when his identity is subject to being revealed; if the House and Senate of the United States deem it important to protect the flow of information from these sources, the protection must be effectual. Further, in California, our court has declared that in the case of reportage of a criminal proceeding subject to the issuance of a gag order, the California shield law is an unconstitutional interference by the California Legislature with the California judicial system. With this declaration that our legislature cannot protect the public from this judicial inroad upon a free press, our only hope of breaking California court's rigid control over speech respecting criminal proceedings is by the enactment of effectual Federal legislation.

Second, the protection afforded by the legislation should be absolute rather than subject to judicially interpreted and applied qualifications.

After all, we are seeking to induce persons with information to convey that information to the press so that the public may be informed. If the identity of these sources is not truly protected but rather subject to being revealed at the discretion of a judge, the source cannot jeopardize his job, his reputation, or perhaps his liberty by subjecting himself to exposure at the discretion of any governmental official.

Further, I sincerely believe that the present crisis between the press and the judiciary is attributable to a breakdown of the system of checks and balances. The judiciary when weighing first amendment freedoms against claims of governmental necessity made by the legislative and the executive branches was capable of an objective analysis in which freedom preserved its paramountcy. However, as a result of the inexorable limitations of human nature, that same objectivity has not been possible when the judiciary passes upon its own activities which in the name of necessity impinge upon freedom of speech and press. Therefore, no true protection acn be achieved where the judiciary, whose goal is factfinding is left with discretion to override the interests of free speech and press.

Finally, the press in requesting absolute protection is not making an unusual or unprecedented request. There are many instances in which we have decided that implementation of a public policy overrides the importance of ascertaining facts in trials. We see these principles in operation when illegally obtained evidence is excluded and when the attorney-client or doctor-patient relationship is protected. We understand in these instances that the desire is not to create a privileged class of attorneys, but rather to preserve the effectiveness of our adversary system of justice in which the principals appear through representatives. We seek not to create a privileged class of medical personnel, but rather to insure that patients receive effective medical treatment. So here, no one desires to create a privileged class of news reporters; rather, society seeks to preserve the flow of information upon which it depends for knowledge.

If I have a moment, I would like to comment upon one qualification proposed, which, in my judgment, threatens to destroy the protection being considered. At first blush, it seems reasonable to eliminate the protection in defamation cases. However, since most investigative reporting necessarily involves the publication of defamatory matter, inclusion of such a qualification will necessarily hand to the official or other party seeking retribution upon the source of the information a ready and always available tool to compel his identification. We know from the libel action brought by Montgomery, Ala., Police Commissioner Sullivan and others that this tool will be used. No source is likely to reveal confidential information in the face of such a risk. It is not truly necessary to create such an enormous loophole in the protection afforded. In the newspaper's defense to the libel action, failure to reveal the sources will impair the newspaper's efforts to establish its lack of malice. If the newspaper is willing to bear that civil burden, there is no reason to compel disclosure of its sources.

Thank you.

Senator Tunney. Thank you very much, Mr. Warren. We appreciate very much that interesting insight into the gag law in the California courts and the effect it has had in California upon news coverage.

I have a number of questions that I want to ask you but I will defer to Mr. Lawrence or Mr. Nelson. Do either or both of you have statements?

Mr. Lawrence. No.

Mr. Nelson. No.

Senator Tunney. Well, before I address a few questions to Mr. Warren, I would like to have you, Mr. Lawrence, and you, Mr. Nelson, describe in detail the procedure by which the supena was issued demanding that you make available certain notes regarding the now famous Watergate case.

Mr. Lawrence. Mr. Chairman, the subpena was issued. There are three subpenas; namely, Ronald Ostrow, Jack Nelson, and myself. They were issued on a Thursday or Friday, as I recall. They were returnable the following Tuesday, which meant that there was very little time for the *Times* attorneys to prepare any kind of a case to quash the subpenas. We went into court on a Tuesday morning to argue the motion to quash. The judge called before him, before this motion was heard, the grand jury to advise them that they should not talk to the press and compliment them for not having talked to the press. The proceedings then went on to the point that by 3 o'clock in the afternoon I was put on the stand and asked whether I would submit these tapes and I respectfully declined for the reasons we stated in our motion and by, I would say, 3:15, I was behind bars.

Mr. Nelson. I think it might be well to give you a little background before the subpena was issued and also I think it may show you the way the whole interview was carried out and the way we dealt with the tapes later will show you the chilling effect the *Caldwell* decision has had on the way reporters operate.

To give you an example, Baldwin was interviewed for 5½ hours on tape. Then we started putting the story together, Ron Ostrow and myself, and we had it rather hurriedly because we learned that the

Government knew of the interview and we were relatively sure that the Government would try to prevent publication one way or another. Of course, they did. What happened was we stayed up all one night and dictated the story to Los Angeles and finished it up at 4:20 a.m., and the reason for that was we were afraid, as I say, the Government might try to prevent publication. About 8 o'clock I got a call from one attorney for Baldwin. "I am sorry, you can't run the story. I would like for you to be able to. We have had a call from Government attorneys and they have told us if the story runs Baldwin may lose his immunity from prosecution and may also be held in contempt of court." I was noncommittal and I said, "I will have to talk to the editors in Los Angeles because the story has gone to Los Angeles; it's been called in."

Several hours later the attorney called back and he said now you really can't use the story because Judge Sirica has signed a gag order, and if you do Baldwin will be held in contempt. So I spent the day, Ostrow spent the day, talking back and forth with the attorneys, Bill Thomas, the editor, and finally the editor made the decision the only reason they were asking us now to withhold the story was because of the Government intimidation of the source. We had acted in good faith. We thought we had lived up to our agreement and so the decision was made to publish the story. Of course, it was done. Even after that we got to thinking about the tapes and we were very worried about it. You can become so paranoid in this city with the way the Government operates. And on our way back from New Haven, Conn., to Washington, Ostrow and I decided we are going to do these tapes because the Government probably will be after them. What are we going to do? We got back and decided after conferring with the national editor in Los Angeles we should mail the tapes out there, which I did. Five days later our fears about that proved out because Earl Silbert, the chief prosecutor in the Watergate case, asked me where the tapes were. I said, I can't say, you will have to talk to the attorneys in Los Angeles, and he said, "Well, you know you are going to have to turn them over because if we don't subpena them, the defense will and another attorney in the case. If you don't turn them over you will have to go to jail because this is what the Supreme Court said in the *Caldwell* case."

Well, as you know, the defense itself did later subpena the tapes but when they subpenaed them Silbert said in open court this may raise a first amendment question but the Government has no objection, and he also said the Government would like very much to see or listen to the tapes, too.

So I think that with that sort of background you can see that we did operate in an atmosphere of Government intimidation.

Senator TUNNEY. I certainly can see that. One of the areas of discussion before this committee has been the procedures that should be followed in the obtaining of a subpena, assuming that there is no absolute privilege. Assuming legislation passes, legislation which would provide a qualified privilege, should there be procedural inhibitions in the ability of the Government or anyone to obtain a subpena to turn over a newsman's notes? It has been suggested by one witness before the committee, Senator Eagleton, in legislation that he has introduced, that a judge should have to order the issuance of the subpena in the first instance.

It has been suggested by others that there ought to be an automatic appeal from a subpena. I would just like to have Mr. Warren, as a lawyer who apparently has had 30 of these cases and whose brief is computerized, testify as to the difficulty that you have as a lawyer appealing from the issuance of a subpena and at the same time protecting the rights of your clients.

Mr. **Warren**. A subpena is obtainable from a court now upon a simple showing to a clerk in the case of the subpena duces tecum and in the case of a subpena that does not demand the production of documents, is in every lawyer's office. Consequently, when someone desires to subpena a *Los Angeles Times* reporter, the only expenditure of time, money, and effort involved is to have a secretary type in the caption of the case and then name of the reporter or the name of the newspaper. Then the burden entirely shifts to us and we must prepare why it is that we don't care to respond to it. And we, of course, do so now in the context of some very hostile case authority. We have a very short time within which to act. We must not have our reporter become in contempt of court by simple failure to appear so we begin negotiating with the counsel who served the subpena not to actually require his attendance on the day given. We call the clerk of the court. If necessary a lawyer goes down to be sure that there is not a failure to appear. In other words, the burden is all upon the party who seeks to protect the freedom of information. I would like very much to see that burden reversed and reversed effectively.

Senator **Tunney**. And assuming that you didn't have an absolute privilege, can you suggest how the burden could be shifted?

Mr. **Warren**. Yes; I believe that in any case where a newspaper reporter is to be subpenaed, assuming he may be subpenaed for any purpose, that there be a necessary showing made to a judge, not made by an ex parte affidavit which is filled out very routinely and will recite in conclusionary terms any facts which the legislation states. If the legislation states you must say that you have no other sources, somebody will, say, type in there there are no other sources. Whatever it is will go in that conclusionary affidavit.

But if there is required to be a strong showing presented at a hearing, with an opportunity for the newspaper to be present and to argue against it, and if the burden is placed very heavily upon the party seeking that subpena, at the very least, hopefully, the party issuing that subpena will have pause for thought before letting themselves in for that sort of a burden.

Senator **Tunney**. Are you familiar with the *Cervantes* case?

Mr. **Warren**. Yes, I am.

Senator **Tunney**. The *Cervantes* case, now reading from the *Law Week*—I don't have the case in front of me—states that newsman's confidential sources need not be identified to the plaintiff in a libel suit absent concrete demonstration that identification will lead to persuasive evidence on an issue of malice.

I am sure you have had the opportunity to read and reread that case. How do you feel that the rule announced by the court in the *Cervantes* case applies to the problem of a newsman who is being subpenaed or is having his documents and private notes subpenaed in a criminal case? Do you feel that it would provide a sufficient protection or do you feel that it would not?

Mr. WARREN. No; I think that the *Cervantes* case cannot be applied in the criminal field at all because there are two essentially different propositions involved. In *Cervantes*, really, the question was let us take a libel defendant who wants both to defend the libel action and yet not to reveal the sources of his story. There the court was deciding how long the newspaper can continue to withhold its sources and yet successfully defend the libel action.

For example, if you talked about applying that particular criterion to a criminal proceedings when you were asking a reporter to come in and give testimony, not with any civil liability of his own, then some question about whether the party involved in the criminal proceedings could sufficiently show his case apart from the news story would have, I think, very different connotations than that in the civil libel field. I think it would be a mistake to try to apply that thinking to a third-party criminal case.

Senator TUNNEY. And I would assume that you feel that the procedures that you have espoused here today would not unduly burden the court, particularly when social values are measured. We would be weighing the social value of freedom of information in protecting confidential sources against the interests of a person who is filing a libel suit or who is a defendant in a criminal case, or against the interest of a district attorney to get information.

Mr. WARREN. No, I frankly feel that I would hope very much that no legislation would be considered which would enable confidential sources or information to be breached regardless of the procedures used, but I certainly don't think that if procedures are involved as to other types of information it will impose any undue burden upon the court. We have a great many situations where preliminary showings must be made. For example, if a court is going to issue a temperary injunction which directs somebody for a period of time not to do something that he otherwise would do, such as issued only upon the strongest showing of immediate and irreparable injury if the act is not stopped. Courts are very familiar with requiring antecedent showings before they act.

Senator TUNNEY. I would be curious to know how much of Mr. Lawrence and Mr. Nelson's time was taken up during that period where the subpena was issued ordering you to reveal certain private information that you had, the tapes that you had, and I would like to know that because you work for a very large newspaper. There are many smaller newspapers who do not have as many reporters as the *Los Angeles Times*. I would be curious to know how much of your time was taken up with this litigation.

Mr. LAWRENCE. In my case I would say from the point that the subpena was issued, which would be a Thursday and a Friday, some of the time that weekend, all of Monday and Tuesday, I was in jail briefly on Tuesday, further jailing was continuing in prospect Wednesday, Thursday, Friday and into Saturday, so that it would be about 10 days that was really almost entirely devoted to this action.

Mr. NELSON. Well, I didn't spend any time in jail so I didn't lose that time. I don't know that I can really give you the exact days but I can tell you I spent an awful lot of time over a number of days even prior to the issuance of the subpena knowing full well that we were going to be subpenaed, that is drawing up long memos, interoffice memos, all of which, incidentally, was subpenaed, and these memos were drawn up because we figured we might be subpenaed. As a matter of fact, the original subpena in this case included all notes, all interoffice memos, and my attorney asked me for a list of it and it filled up a large brown envelope and I had notes in notebook on the Watergate case which included information on a confidential source that happened to involve a client that my attorney was representing. That is sort of some of the kind of information that was accumulated there.

Senator **Tunney**. And the Los Angeles Times Corp. paid for your attorney's fees.

Mr. **Nelson**. They paid for my attorney's fees, for Ostrow and myself.

Mr. **Thomas**. Let me add a word on that. If you are figuring out how a subpena would affect a small newspaper, in addition to John and Jack and a few other members of the bureau, the national editor, myself, and eight lawyers spent full time Thursday, Friday, Saturday, Sunday, Monday, Tuesday, and into Wednesday morning on just this Watergate subpena. You can figure what that adds up to.

Senator **Tunney**. It adds up perhaps to a different kind of justice

Mr. **Lawrence**. In my case, I would say from the point that the

for reporters of large newspapers than for reporters of small newspapers.

Mr. **Thomas**. Or surrender.

Senator **Tunney**. That is right. When we talk in terms of an absolute shield, the term itself contains some ambiquity, specially as to the scope of the absolute shield and the definition of newsman.

If we shield absolutely confidential sources and confidentially obtained published material and if the definition of who is protected is broad, would that be sufficiently absolute to protect the free flow of information, Mr. Thomas?

Mr. **Thomas**. No; I think in order to protect the free flow we have to do something about protecting the newspaper from becoming a source itself regardless of confidential information or even unpublished information. We really got into this trouble in the first place not through confidentiality. It all began at the time of the Watts riots and then the student riots in which our newsmen were obviously witnesses to all kinds of events which wound up in litigation. So that is when the flood of subpenas started. It started in search of newsmen as witnesses, as agents of the court either for the defendant or the prosecution. So we still would be faced with the enormous burden involving protecting the confidential and the unpublished source. We also should be kept clear of the courts. We can't become agents of the court and still do what we are supposed to do. As soon as we show up on one side or the other in the court it is a clear message to people on the outside not to talk to us if they don't want to show up in court one way or the other.

Senator **Tunney**. So what you are saying is that you feel that there should be an absolute privilege or no legislation at all.

Mr. **Thomas**. No; my lawyers tell me not to say that. What I am saying is that an absolute privilege really doesn't sound so unreasonable to me. I have been in this business 23 years and until 2 years ago I thought I had an absolute privilege and behaved as though I did and so did everyone else I know in this business. So what we are simply asking for is a return to where we were before the courts began to build upon their—what is the word I want—gag orders were an extension of their strength which in turn pyramided into what we have now got, which is control outside of the court by the judges inside of the court.

Senator Tunney. What was the relationship that you and people working on your newspaper had with prosecutors before the Supreme Court cases?

Mr. Thomas. Well, our relationship with them was not altogether different than it is now. It is only a few people who give us trouble and I won't single out prosecutors. Defense attorneys have been every bit as assidous in seeking to use us as prosecutors have. We always had an understanding, I think, with prosecutors, there were certain things they couldn't ask of us. They couldn't bring us into court, they couldn't make us serve as an agent of the court, they couldn't get hold of our material. When they made feeble efforts to do so, that is all they were in those days, we told them they were not going to do it and that was the end of it and they understood we had an absolute privilege and so did the defense attorneys we dealt with in those days. That all changed when the first subpenas were granted under the gag orders and associated matters. I say it all began during the riots when the subpenas were beginning to be honored and some of them weren't fought hard enough by enough people. As soon as a few people, judges did it, it became clear it was possible to be done, then began the flood of attempts.

Senator Tunney. Do you agree with the previous testimony that the term "newsman" should not be defined?

Mr. Thomas. I can't say that I agree totally with that concept and I think we could find a reasonable definition of newsman in an absolute privilege bill.

Senator Tunney. Mr. Warren, as a man who has dealt with these cases as a lawyer, do you have any impressions on that?

Mr. Warren. Yes, I think that when Congress is going to use a term in a bill which is central to the interpretation and application of that bill, it is appropriate for Congress to define it. If Congress does not do so, it will be done by the branch of government which in our judgment is the source of the problem. Consequently, I see no advantage to congressional purpose to leave the definition of what is a newsman to the courts.

Senator Tunney. One of the issues that has come up in these hearings is a very difficult philosophical problem. That is when a newsman is walking down the street, he is not covering a story, but he sees a crime being committed in front of him. Should he be exempt from having to testify as to the facts as to what he saw?

Mr. Thomas, do you have any thoughts on that?

Mr. Thomas. Yes, we have never claimed noncitizenship and that is what that would amount to. All we want is protection when we are doing our job. When we are not doing our job, I think that we are susceptible to the same claims which can be and should be made upon all citizens. In those cases we should be called upon to testify and we would.

Senator Tunney. If an absolute privilege bill passed the Congress, it would be possible for, we will say, a person who was friendly to an organization that was determined to change the social order through revolution, to be standing on the steps of a Federal building and watch a friend come up those steps and throw a bomb into the building and he would be exempt by the language of the legislation, from having to testify as to what he saw. Do you suggest that result?

Mr. THOMAS. No, I think that we will accept an absolute privilege that extends only to the area in which we do our jobs. I think that would be very nice.

Mr. WARREN. I would say I don't see a correlation between the absolute nature of the privilege and the question as to whom it extends. I think that an absolute privilege bill can be drawn which is restricted only to those Congress feels are entitled to it and excluding those who don't come within the ambit of newsmen.

Senator TUNNEY. One of the problems arises with a situation such as the *Branzburg* case where you had a reporter observe a crime and he wrote a story that I personally feel was valuable. It gave information to the people of that community as to the scope and nature of the drug problem but how do you except out a situation like *Branzburg* and include in a situation like a reporter standing on the steps of the Federal building, a reporter who works for, we will say, a revolutionary journal and who sees a bomb being placed in that Federal building?

Mr. WARREN. Is the reporter there in the performance of his function as a newsman? Because if he is, then I agree that an absolute protection would prevent his testimony. I can only say in regard to that that all these other relationships that we are talking about where we, for example, said that a man's wife does not have to get on the stand and testify against her husband, and I don't care what she saw him do, our courts for years have accepted a proposition a man's wife should not be required to testify against the husband and vice versa, spousal privilege. And why is that so? Well that is to protect the sanctity of the marriage relationship and preserve harmony in the home. All these gentlemen are doing here is saying that the flow of information to the public regarding our society deserves the same kind of protection and maybe more so as marital harmony.

Senator TUNNEY. Well, I am very impressed by the testimony that we have heard regarding the ease with which subpenas are issued by judges and the cost to the recipient of such a subpena, or to the newspaper for which he works and how we are going to have to, in any legislation we pass, deal with that very central factor.

It is a surprise to me to know that it has been easy to get a judge to issue a subpena as you indicate, Mr. Warren, as in California.

I want to thank you very much for your appearance, Mr. Thomas, Mr. Warren, Mr. Lawence, Mr. Nelson. You have made a very valuable contribution to our proceedings.

Mr. THOMAS. Thank you, Mr. Chairman.

Senator TUNNEY. Our next witness is Mr. Richard Wald, the president of NBC News. Please proceed.

STATEMENT OF RICHARD C. WALD, PRESIDENT, NBC NEWS, NATIONAL BROADCASTING CO., INC.

Mr. WALD. Mr. Chairman, my name is Richard C. Wald. I am President, NBC News. I have been a journalist and writer all my working life. But never in my experience have the difficulties of following my trade been as great as today.

The flow of information that we all live by is becoming restricted. The newsman's function—which is to foster public understanding by increasing public knowledge—is in danger of narrowing. And while the bills that come before this committee bear the inscription, "Newsmen's Privilege," it is not a privilege at all. It is a safeguard for the public—a public that needs the sources of confidential information protected so the flow of information to the people will not be obstructed.

So I look to this committee—not only as a newsman but as a citizen—for assurance that the press will remain free to perform its function. And I welcome the opportunity to assist in your efforts by addressing myself to those subjects which Chairman Ervin has indicated are of particular interest.

Is a statutory exemption for newsmen desirable?

Official demands for journalists' non-published material, to be used as evidence or leads, have increased enormously in the past decade, so that an exemption is needed now more than ever before.

One factor in this change is technological. Journalists have been able to get to the source of the news more than before and to gather material in a form more convenient for enforcement officials. Convenience for prosecutors does not equate with necessity for courts. But courts still allow prosecutors to make newsmen part of the enforcement apparatus, a practice which damages their real function.

Another factor is the growth of the Federal Government. As the list of Federal crimes has grown, Federal law enforcement activities have also expanded. In turn, subpenas and informal demands for newsmen's material have multiplied.

This trend will not disappear on its own, although its intensity may wane or grow in cycles. Demands will continue, and will grow, unless stopped by some legal barrier, and that is why—we believe—statutory exemption is desirable.

Before the Supreme Court's decision regarding *Caldwell*, *Branzburg*, and *Pappas*, I and many other newsmen assumed that the first amendment protected the press from compulsory testimony. We were told that a developing trend of court decisions tended to uphold this protection. Then came the *Caldwell* decision.

And so we turn to Congress for help to protect journalists' access to news sources, so that communication may freely flow from them to the public.

The need for such help has become even clearer since last year's hearings, and this has been recognized by the number and quality of the bills introduced so early in this session. The hearings on these bills also show a serious congressional intent to consider—and hopefully to act upon—their common objective.

The public interest in protection of news sources has been underlined by recent jailings and threatened jailings of newsmen. These publicized events illustrate, in a highly visible manner, a continuing, but less visible, intrusion on the ability of the press to inform the public.

It is impossible to guess at the number of news reports that rest on essential information confidentially given. I don't pretend to know how many have been held back recently, although NBC is now cooperating with both Sigma Delta Chi and the Associated Press Managing Editors in their attempts to make industrywide surveys. One of the problems of such a survey is that if it gets specific enough to demonstrate the point, the person who gives a good example may wind up facing a jail term.

Anonymity and confidentiality must play a large part in our business. The reasons vary as much as people and news items. Family and business relationships, friendships, hatreds, fear of retribution by criminals—or bosses—all play a part.

The classic examples are probably those where information may reveal wrongdoing by public officials. Too often, when their identity is discovered, informants are treated as if they were the wrongdoers.

A graphic illustration involved recent reports that inmates of a Tennessee mental institution were being mistreated. The stories gave rise to an investigation and demands for identity of the source. One reporter disclosed his source, and the result? The source of his information, a secretary at the hospital, was fired.

Thus you can see why some people with important information remain silent rather than risk their jobs, their relationships, or sometimes even their lives, on the will of a newsman to stand firm under continuing pressures and possible punishment.

Completely aside from any rights of an informant, the fundamental public right to the information should not have to rest on newsmen's individual choices to hold to principle and be punished as a result. Our whole social and governmental system rests on the premise that information about the public's business will flow fully and freely from source, to media, to public. When that process is blocked or hampered, our society cannot function as it was intended.

Should the exemption be absolute or qualified?

We at NBC conclude that preference should be given to legislation which affords absolute protection to the newsmen and others employed in the gathering, processing, and presenting of news and information to the public. That conclusion prompted NBC president Julian Goodman to endorse the approach taken by Senator Cranston's bill, S. 158. We also pledge to support any similar bill which appears administratively workable and shares the same broad objective.

The scope of statutory protection should be tailored to the dimensions of the need—a need demonstrated by recent instances of testimonial compulsion. This need is for full protection of media and newspeople against forced testimony regarding either information or source.

This, at least, is the lesson learned from the experience of reporters who have recently refused to comply with subpenas in reliance on State "shield" laws.

The qualified statute in Maryland, for example, was held unavailable to a reporter because he did not advise his news source that he was a reporter.

The qualified statute in New Jersey was unavailable to a reporter because he had partially complied with a subpena.

In California, statutory protection was denied once the reporter ceased to be employed as a reporter, although the information sought had been gathered in that capacity.

And although most people today get much of their news through television reporting, a New York court has ruled that a television cameraman is not a reporter for the purpose of invoking the shield law of that State.

Rulings such as these work against a legislative intent to afford first amendment protection for news gathering and reporting. But as long as statutes grant less than an absolute privilege, prosecutors will be able to act on loopholes in the law, and opportunities for narrowing the scope of protection will multiply. We agree with the observation of Justice William O. Douglas that, "Sooner or later, any text which provides less than blanket protection . . . will be twisted and relaxed so as to provide virtually no protection at all."

This position is not inconsistent, as some contend, with the public interest in law enforcement. Arguments to this effect, designed to place the interest in law enforcement above that of public information, are generally based on hypothetical, rather than real life, situations. The facts of life typically show that justice will not suffer from protecting the news gathering function. Alternate sources of legally relevant information are generally available. And often, information vital to law enforcement officials comes to them through reporting from the newsman's confidential source; so that drying up of these sources can adversely affect law enforcement as well as public information.

This fact is apparently recognized by many of the Nation's law enforcement officials, including Connecticut State Attorney General Killian, Houston District Attorney Carol Vance, who is also president of the National District Attorneys Association, State Attorney for Dade County Richard E. Gerstein, and New York Deputy Attorney General Robert Fischer.

Should state proceedings be included?

The reasons for absolute protection apply no less on the State than on the Federal level. The *Caldwell* decision appears to have weakened the force of shield laws in States which have them. Although the Supreme Court was construing the U.S. Constitution, some State officials have followed its construction as a model. In New Jersey and California, where two of the contempt cases arose, shield laws were construed so as not to protect. In both States the response of the State legislatures was prompt and gratifying.

New Jersey amended its statute by affording the absolute protection we are urging. Other States, such as Illinois and Massachusetts, are considering legislation. But while these scattered actions are encouraging, they cannot replace the need for consistency, in so vital an area, through a comprehensive Federal law.

I am no constitutional lawyer and cannot judge the seriousness of any constitutional question that might arise should the Congress seek to legislate for the States in this area. If there is cause for serious concern on this point, then a more prudent course might be to limit the Federal law to Federal proceedings. An otherwise acceptable Federal law then might become a model for State legislation on the subject.

Who should be entitled to claim the privilege?

Every person genuinely engaged in the gathering and dissemination of news should be protected in the exercise of their news function. Any definition of categories of persons to be protected is almost certain to omit some people who, in the circumstances of a particular case, should come within the principle of the first amendment.

Instances of improper omission would be minimized by an approach that focuses on a person's good faith participation is news gathering and dissemination for a regularly published news medium. Questions of good faith, in the context of many different laws, are resolved by courts everyday. They are well equipped to deal with such questions and should experience no special difficulty in the context of a news subpena statute.

If qualification is desirable, what should the qualification be?

It is difficult to discuss the character of qualifications because I believe it is preferable not to have any. It is particularly difficult because they all appear susceptible of interpretation that could eliminate the intended exemption. I can, however, tell you what I feel most strongly they should not be.

There should not be a qualification to prevent threatened harm, however serious the anticipated harm may seem. The bills that have taken this approach speak of espionage, foreign aggression, and danger to human life. These are serious crimes but a statutory exception for them seems unwise. The situations assumed by them are unlikely ever to arise. No one says they have. But it is all too easy for a prosecutor to discern a possible threat that fits a statutory description where none exists.

I also urge that you not limit protection to confidential sources or to confidential information. Such a protection would not protect the ordinary, decent citizen who wants to disclose wrongdoing. He generally will not think of negotiating terms that will protect him under such a qualified statute. This is illustrated by the Tennessee situation I mentioned earlier, where—according to the reporter's explanation—the unfortunate secretary had not asked for a promise of confidentiality People often think that public disclosure itself will correct the situation. To penalize such unsophisticated disclosure is a harsh penalty to impose on the informant, but the penalty on society is even greater.

Unpublished information should be protected as well because you should not make the newsman's notes an arm of the law.

What should be the procedural mechanism?

We all know that procedure itself can narrow or extend the scope of protection for individual liberties. Historically, procedural mechanisms have defined constitutional rights—such as the right of due process, the right not to testify against one's self, the right to a grand jury indictment before having to stand trial.

NBC's own experience in Illinois may be illuminating on this point. We cover events of local, as well as national, news interest there since NBC owns a radio and a television station in Chicago. In 1968 and the years following, NBC News and its staff were subjected to a barrage of subpenas seeking material gathered while covering newsworthy events in that State.

Illinois had no "shield" law, and news operations were being seriously interfered with. Finally, the State court acted. By a rule of court, subpenas to newsmen or news media were limited with procedural safeguards. Instead of being issuable at will by either prosecution or defense—as in most States—the party seeking the subpena must make a motion, on notice, for an order of the court. Under the rule, such orders are not to be issued without a showing that the evidence exists and is relevant, that a subpena is the only way to obtain it, and that nonproduction would cause a miscarriage of justice. This, of course, was not a full solution, but it has had a significant impact.

If this subcommittee decides against an absolute statutory exempton, I urge that it provide procedural reinforcements, similar to those adopted by the Illinois court, to help secure the intended protection.

Under such a procedure, the party seeking the subpena should have the burden of affirmatively showing at the outset, that the information sought is not within the privilege afforded by the statute, and that procedural tests are satisfied.

CONCLUSION

We believe that S. 158 is ideally drafted to provide the protection required by the public's need for information. It is simple in its terms and direct in its prohibition, with littie room for misunderstanding or misinterpretation. It is administratively workable.

But whatever approach is taken, you will deserve the enduring thanks and gratitude of the public, and its servant, the press, if you enact in this session in any form an effective law to protect and encourage the free flow of information to the public.

Thank you.

Senator **Tunney**. Thank you very much, Mr. Wald. As I understand your testimony, you are not taking the position that we must have either a total exemption or no legislation at all?

Mr. **Wald**. No, sir, I am not. But if I may add to that. I do believe that a total exemption is almost mandatory.

I think that there may be in some way that I have not yet seen a qualification that would be acceptable to us. I haven't seen one yet. It is just you have to assume that maybe somebody has one.

Senator **Tunney**. Are there any circumstances where your network would agree to the release of unpublished tapes where they had a direct bearing upon the solution of a serious crime or upon a serious threat to national security?

Mr. **Wald**. Yes; I think there are such circumstances where, if we were the only holders of such information and such information was required and there was a showing that it wasn't meant to harass or invade our files, or something like that, I think we would cooperate with an investigative authority.

Senator **Tunney**. Are there any circumstances where the network management would overrule a reporter who had obtained certain film footage and the reporter had obtained it with a promise that the source would never be revealed, under circumstances where you have unpublished footage but where a reporter was invited in, like in the *Branzburg* case, with a camera crew to watch heroin being mixed; and by inadvertence the cameraman had actually shot the face of the man who was doing the mixing and that film was never aired and at some future point law enforcement authorities were trying to get copies of the footage?

Would management overrule the reporter's pledge of confidentiality, do you think?

Mr. **Wald**. Well, if I may, I would like to explain something. We are in the business of publishing what it is we find out. In the instance, as you were citing before, of having some information in our unpublished material that would be germane to some kind of prosecution of a serious nature, our main thrust is to put on the air whatever it is we find out, so that the number of such instances is very, very small. In the instance of a reporter who promised that kind of confidentiality to someone and then attempted to keep to his word, I do not think we would overrule him for a very simple reason. Our business is to go places, to be trusted enough to be able to bring information like that to the public. If we should default on our word, if we are made to default on our word, we will have less access, and having less access means having less information, and it is a contradiction in terms.

Senator **Tunney**. What about an approach like Senator Eagleton's, which would provide absolute protection for information obtained from confidential sources and for that material and information which receives qualified protection the procedural requirements as to the issuance of a subpena are very strict, cumbersome, and burdensome—and right of appeal exists from a ruling by the trial court? Does that approach make any sense to you?

Mr. **Wald**. It is an interesting approach and certainly in those areas where it is absolute, obviously, I agree with it. I think that the procedural questions addressed in the Eagleton bill are interesting from my viewpoint because I do believe that those procedures should be included in anything that is less than absolute. I have some problem with some parts of it though and I am not sure, to quote Congressman Waldie, that a search for a compromise is the best way to start a legislative process. I do think that we would be far better served by a truly absolute bill.

Senator **Tunney**. Do you feel that the term "newsman" ought to be defined in the legislation?

Mr. **Wald**. Yes; roughly. I think that people engaged in the business of gathering and collating, editing, and disseminating information ought to be roughly definable and possibly, as I said in the statement, that the ultimate finer points of that definition might be left to the courts. I don't think this is an enormous problem.

Senator **Tunney**. It certainly should include cameramen.

Mr. **Wald**. It certainly should include cameramen.

Senator **Tunney**. The longer I listen to testimony the more difficult appears the problem of trying to write in exceptions to the absolute privilege. I must confess I started off these hearings with the conviction that if a newsman is off duty, so to speak, and saw a crime being committed, he should not be subject to a shield, to a sweeping privilege against having to testify. On the other hand, how do you write in that kind of a qualification? It is a very, very difficult problem to protect the reporter in a fact situation like that in the *Branzburg* case.

Mr. **Wald**. It is obviously difficult. I might just point out parenthetically that a reporter who witnessed a bombing or shooting or serious crime of any kind and didn't think he was a reporter at that moment wouldn't be much of a reporter. It is kind of like being a policeman and watching a crime being committed. You have an obligation. The history of our profession is replete with people who saw a fire and reported on it or were involved in a train wreck—a famous case, where a man wasn't on duty in the sense that it was 9 to 5, or whatever hours he was working, but it was a news event and he was reporting on it. There are very few serious cases in which a reporter who is a reporter could conceivably be so involved without working.

Senator Tunney. Of course, he could report on the story without identifying the person who perpetrated the crime.

Mr. Wald. That is true whether it is 9 to 5 or a Sunday afternoon.

Senator Tunney. There is also a difference where a person, as in *Branzburg*, was admitted into a room in confidence rather than was standing on the street corner and seeing the crime being committed in a public place.

Mr. Wald. Yes, it is; and it is a problem. I live in New York and we have in that specific instance a lot of problems with narcotics and narcotics trade. A lot of what the public knows now about the aspects of narcotics has been put forth by people who know a little bit more about a crime but didn't report it all. The Governor, who is death on narcotics and is very much worried about——

Senator Tunney. Or life, on narcotics.

Mr. Wald. Yes. Feels that that is a supportable situation. His feeling strongly is, as he said here in the committee, that you get more information that way and it is in the greater public interest to find out as much as you can about a general problem than to be specifically disruptive of the process of the press through specific instances.

Senator Tunney. Well, thank you very much, Mr. Wald. That is a very fine statement and we appreciate your participating in our consideration of these various bills.

Mr. Wald. Thank you, Mr. Chairman, for letting us talk about it.

Senator Tunney. Our next witness is Mr. William Payette, president, Sigma Delta Chi.

STATEMENT OF WILLIAM C. PAYETTE, PRESIDENT, SIGMA DELTA CHI

Mr. Payette. On behalf of Sigma Delta Chi, I wish to express our appreciation for the opportunity to appear before this distinguished body and to express to you our deep concern over developments which ultimately lead to blinding the public eye.

Since its inception, Sigma Delta Chi has supported the free flow of information, and has consistently fought efforts to diminish the effectiveness of the newsman in keeping the public informed.

Sigma Delta Chi is the oldest and largest organization serving the field of journalism. Its membership includes 24,000 men and women in every field of journalism, broadcast and print, publishers, editors, news directors, and newsmen on and off the air.

I will try to keep these remarks brief, as requested. I realize that, with specific instances, there will have been a number of witnesses, and I will try to avoid going over the same ground.

I do think, however, that we must view the shield law and the urgent need for it in context. It is of a piece with an entire battery of pressures aimed at shutting off the flow of information.

As a result of these widespread attacks, a climate has been created in which a reporter's attempt to do a job is daily frustrated almost everywhere. I travel up and down and across this country a great deal, and when you do that, you are aware of the countless blocks on the local, State, and National levels. The adversary relationship between the public, through the media, and public officials is historic, but surely to my knowledge has never been as vicious or as thorough as at the present time. Just as the physical activities of the Kennedy administration sent the country off on 50-mile hikes and a reasonable number of pool-pushings, the current consistent efforts to discredit the media have created a climate in which everyone feels free to join.

There are a number of ways in which the muzzle can be applied.

Broadcasters live presently under the very real threat of loss of license, and conceivably many of them could find it easier to conform to the notions of whichever administration is in power than to devote endless years and dollars to an effort to save the license. One station of the many now trying to defend their licenses has been at it more than 4 years, spent more than $2 million—costs of more than $75,000 on the transcript alone—and far more than $2 million in effort and business lost because of the diversion of their effort.

A Boston book publisher is on the verge of bankruptcy because of legal consequences of publishing the Ellsberg papers. Asserting the right to permit or withhold advertising, whether it be for cigarettes, toys, or public utilities cannot be ignored.

Statements by national officials, both elective and appointive give sanction to repressive acts by lesser men throughout the country. In the interest of brevity and to avoid repetition, I will not go into the *Peter Bridge* or *William Farr* cases, except to point out that aside from the basic injustice of their imprisonment, how curious it is that in reporter FARR's case the judge held that a reporter he was protected by the California shield law. When Farr left the newspaper to become an information officer for the district attorney's office, the judge ruled that Farr had lost his reporter's status, and therefore, could be questioned and held in contempt for refusing to reveal the sources of his story. If that were not curious enough, when Farr left the district attorney's office and resumed reporting on another newspaper, the judge held that this did not restore his immunity.

When word that Farr has been jailed reached the floor of the Sigma Delta Chi convention in Dallas in November, there was a standing ovation of sympathy, and in later business sessions, delegates approved the following resolution:

> Whereas Sigma Delta Chi has long recognized the need for confidential relations between reporters and news sources, and
>
> Whereas recent events, including the jailing of news reporters for declining to reveal their news sources in an effort to preserve the public's right to know, has shown the growing and continuing nature of the problem; and
>
> Whereas these events include the increasing use of Government subpenas against newsmen; and
>
> Whereas these actions have shown an even greater danger to the free flow of information to the public than had been previously recognized; and
>
> Whereas Sigma Delta Chi is involved with a joint media committee promoting legislation—shield laws—on a national level and is similarly working for such legislation in all 50 States: Therefore, be it
>
> *Resolved*, That the 63rd Annual Convention of Sigma Delta Chi establishes as its ultimate objective the enactment of absolute privilege law in all 50 states and at the federal level, and be it further
>
> *Resolved*, That this convention instructs its officers and representatives on the joint media committee to work for the strongest possible shield legislation in the 93d Congress.

And here we are.

Tyranny and oppression and control of the press always have been imposed in the guise of promoting the public good. And it never has.

There always is a valid reason for shutting off the press, although generally it is valid only to the person turning off the faucet.

It doesn't make a great deal of difference which side of the street your politics come from.

William Kunstler makes a career out of what he regards as defending liberties. And yet he has subpenaed the records of *New Yorker* magazine to help his defense of Rap Brown. When he was asked how a man of his posture could take this stance, he is quoted as saying, "These constitutional niceties don't mean a damn thing to me when my client's life is at stake."

And so it is.

In the case of governmental or bureaucratic subpenas, the client is the bureau or the party or the administration and the constitutional niceties don't mean a bit more there. And since I wrote that an arm of the Republican Party has issued a dozen subpenas for reporters and editors of the *New York Times*, *Time Magazine*, the *Washington Post*, and the *Washington Star-News*.

The inhibiting effect of subpenas is unquestioned. No one in his right mind will talk to a reporter on a sensitive subject if he knows the reporter can be required to turn him in. A couple of days ago a New York judge held that two television newsmen inside Attica during the riots, at the moment about which they are being subpenaed to speak they were not acting as newsmen, therefore, they can be subpenaed and required to speak. I can imagine how much news a reporter will get if he finds it necessary to advise the people he speaks to before he asks his question that anything they say may be used against them. I can imagine the effect that would have had if these reporters had made this statement inside of Attica.

There is no question that the subpena for the Watergate tapes had a chilling effect on news sources. Nor is there any question that the man who made the tapes would have refused if he had known the source could be identified. He voluntarily released them, not because he wanted to, but to keep a reporter from going to jail again.

What was more puzzling was the FBI arrest of Les Whitten as he was helping carry some of the "broken treaties" documents back to the Government. The Government had paid the Indians who hauled the treaties away, but arrested Whitten and Hank Adams, who were bringing some of them back. This seemed most curious.

Now Anderson has supplied the answer, and it lies at the heart of the shield law.

There was no case against Whitten, and a grand jury refused to indict him.

Anderson has now found that 2 days after the January 31 arrest, the FBI, in the guise of investigating the crime, got a court order requiring the telephone company to give them access to the records of Jack Anderson's telephone calls. As Anderson notes, the FBI subpenaed records dating back to July, 4 months before the Indians stole the documents. But Anderson's office and home telephone records were subpenaed. And, Anderson says, they were looking for sources far afield from anything involving the Indians, as the dates would indicate. Since I wrote that, it has come to light that indeed the FBI is checking the numbers on this list and have communicated with people whose numbers were unlisted and have questioned them about other matters involving other such stories which Jack Anderson had carried.

This is, of course, outrageous. Anderson doesn't really care whether you like him or you don't like him. And this should have no bearing on his freedom to pursue one of the most important jobs in Washington, and one being done by no one else. A government is a poor watchdog of its own affairs and has a predictable way of punishing those within the organization who try to rectify error.

As you perhaps have not noticed in your busy lives, the Knapp Commission conducted hearings into crime in New York City. You also may not have noticed that the most prominent witnesses against police corruption before the commission have since been tried on charges ranging from murder to perjury. You may not have noticed that two inspectors in the New York Transit Authority tried to rectify the most flagrant abuses of public trust within the authority. They got nowhere, so they made movies in the yards showing workmen sleeping, drinking beer, conducting small business, playing cards, and diverse other ways of earning a salary in the authority. The film was shown on a local television news show, and the inspectors, of course, have been suspended without pay and charged with making a film when they were supposed to be working.

This is by way of saying that the direct approach seldom succeeds.

It could be said that a reporter should dig things out for himself, but those who say this must realize that digging largely consists of finding the people who know what you need to know. Frequently, men of good conscience find the reporter.

With a bureaucracy at all levels so enormous, there simply would be no reporting if it consisted of a newsman's going from bureau to bureau and talking to no one. He cannot learn anything by looking at a bank of computers, or even, generally, stacks of records. Generally, someone must supply the key.

I would guess that the knowledge that the FBI has a record of Jack Anderson's telephone calls would discourage many a volunteer.

I know that the flow of news has slowed as a result of these subpenas. I know of one illuminating story which is not being reported because of the responsibility of involving the source. Many of my friends know of others.

These remarks may be encouraging to the people who are pushing for disclosure, but no thinking man, no matter how partisan, could feel that this is good. Every party and every administration is out of power sometime, and the view from the outside is much different than from the inside.

A President may feel that the media should not be critical of the administration and should back the President's difficult decision. A candidate on the other hand, does not feel this way. The ability of the media to work freely between these two views is our safeguard.

A newsman without sources is a newsless man. A public without news is a blind and ignorant public, and as we move evermore toward one-man, one-vote, direct election, and universal, unqualified suffrage, the result will destroy us all.

Thank you.

Senator TUNNEY. Thank you, Mr. Payette.

I appreciate the remarks that you have made. I think that they go to the heart of the problem that we are facing.

I would like to ask you one question about the Kunstler situation. What about a situation where a man's client's life is at stake? What about exculpatory evidence that a newsman might have or that a newsman in all probability has?

Do you feel that the social value of allowing that defendant to have access to that exculpatory information outweighs the value of a newsman's shield?

Mr. PAYETTE. Senator, I feel that in actual fact, attorneys and clients aren't interested in a fair trial. What they are interested in is winning. I think they will use whatever resources they can command to win. If you can confuse the issue or the jury enough by bringing in whatever you can grab, you frequently will get an acquittal.

Now, in the case of exculpatory evidence, I think that in a reporter's own good judgment he could supply this if he felt that it would not compromise something more important.

What we are talking about here is getting back to what we had. We talk about absolute shield versus qualified shield. For 200 years we have had an absolute shield. We have had absolute unabridged freedom of the press for 200 years. In the past few months this has been changed.

What we want is to go back to a system which has worked satisfactorily. I won't quote Madison or Learned Hand or Harold Medina; you have heard these quotes. It has worked very well for 200 years. Newsmen, I think, have absolved more innocent people than they generally are given credit for. I think far more people have suffered at the hands of guilty people who have gone free than innocent people have suffered as a result of a newsman's failure to cooperate.

We have been involved these 200 years in innumerable wars and innumerable peril where the survival of the state was at stake. We have had assassinations of our national leaders, and in none of these cases has the newsman failed to cooperate in any area which would be helpful. This has worked this long. I don't think we should be talking about trying to get back a piece of what we had. I think we should go back to what worked.

Senator TUNNEY. So, in other words, you are saying that it is all or nothing.

Mr. PAYETTE. No. I am not saying all or nothing. I am saying all.

Senator TUNNEY. Well, I am trying to——

Mr. PAYETTE. We are simply trying to restore what it was and what previous Supreme Courts have held it to be, Senator.

Senator TUNNEY. In other words, though, you are saying that if you can't get an absolute privilege bill through Congress, that you would prefer no legislation at all?

Mr. PAYETTE. I am saying that the trouble with definitions; with clauses which set out parameters, is the trouble with all legislation—and this is why we have attorneys and everyday we have more—that the minute a piece of legislation is written, hordes of attorneys go to work on this to find out how it could be used. And these subpenas and jailings have occurred under qualified shield laws and the problem of whether the man is on duty or not is easily defined where it is a question of whether you have reasonable evidence of a crime. This is how Jack Anderson's phone calls were secured, on the pretext of a crime. So there always is a way to do these things and the more words we put into this the less likely we are to have a true shield.

Senator TUNNEY. I understand that. I understand exactly what you are saying.

But we have heard statements from Senators sitting on this subcommittee, we have heard statements from Congressmen sitting on the corresponding committee on the House side, that it is highly unlikely that an absolute shield bill will go through the Congress. I am one person who has indicated that he tends to favor an absolute shield, but I have also indicated that I was going to keep an open mind during these hearings. I am asking you a direct question and maybe you prefer not to answer it, and if you do prefer not to answer it, please say so—do you feel that it is all or nothing?

Mr. PAYETTE. Senator, I couldn't give you a valid answer to that without seeing how much is lost. Conceivably there could be a qualification which would not put a newsman at that much hazard. Actually, this is another thing I object to, this being called a newsman's privilege law because so many people, unfamiliar with legal terms, regard this as putting newsmen in a special category and it is not that at all.

Senator TUNNEY. I agree with it.

Mr. PAYETTE. It is to preserve the free flow of information. It is conceivable there could be, some kind of limitation, but I haven't seen it. Most of the ones I have seen I think would be harmful. They would be confirming an erosion of fundamental rights and this is perilous. I don't think we want to do that. We want to get back to the rights as they were last year.

Senator TUNNEY. Yes; I feel that it is too bad the legislation is not entitled, "The Public's Right to Know" bill. I agree that conceptually the symbolism is wrong when you talk about a newsman's shield bill.

Well thank you very much, Mr. Payette.

Mr. PAYETTE. Thank you, sir.

Senator TUNNEY. I appreciate your testimony.

Our last witness is Mr. Charles S. Perlik, president of the Newspaper Guild.

Mr. Perlik, if you could identify the gentleman that you have with you.

STATEMENT OF CHARLES S. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO, ACCOMPANIED BY JAMES M. CESNIK, DIRECTOR, RESEARCH AND INFORMATION, THE NEWSPAPER GUILD

Mr. PERLIK. I will be happy to, Senator. My companion is James Cesnik, the Newspaper Guild's director of research and information, to whom we are indebted for keeping our organization abreast of much that has happened in this area and helping to develop our position with respect to it.

In view of the hour, I am going to attempt to summarize what my prepared testimony said.

Senator TUNNEY. Your testimony will go in the record immediately following your remarks.

Mr. PERLIK. I appreciate that. This is the fourth occasion when I have had the opportunity to appear before a congressional committee on this subject, or if not directly on this subject, on auxilliary subjects dealing with the press, which occasions I have taken the opportunity to comment upon privilege and its effect on our organization.

I must say I feel much more comfortable this afternoon than I have on any of those other occasions, because I think we are among the first, if not indeed the first organization to endorse publicly what has now, at least from what I have heard this afternoon and have been able to follow in press accounts, become a very common, and I am very pleased to say prevailing, viewpoint, at least in the industry, as to what type of legislation is desirable and necessary in this area.

I appeared before this subcommittee last year when it was examining the general state of press freedom in the United States and made these points from which we do not now deviate.

First, that the first amendment protects the right of news gatherers to protect their information and materials as well as their sources from forced disclosure. We still believe that is a correct constitutional view. We still believe that right is absolute and unqualified. We still believe that it applies to any information or source, confidential or not, and we are gratified that the multitude of challenges and erosions to that right in the past year have brought so many compatriots in our industry and citizens in general to our side.

We hope this committee will heed this growing trend. Our organization as you know represents 40,000 persons employed in the news and business departments of newspapers, news agencies, new services, and magazines in the United States, Canada, and Puerto Rico. Large portions of that membership are the foot soldiers in this battle. They constitute the infantry.

Peter Bridge is a reporter; William Farr is a reporter; Joseph Weiler is a reporter; Earl Caldwell is a reporter; Paul Branzburg is a reporter; Brit Hume is a reporter; Ron Ridenour is a reporter. Larry Dickinson and Gib Adams are reporters. The list seems distressingly long and never ending. But now that the Supreme Court has found contrary to our belief as to the first amendment's protections in this area, we must turn to other forms of relief.

First to Congress, which we hope will enact a bill broad enough not only in its protection against forced disclosure, but broad as well in the reach of its jurisdiction—to the States and other levels of government where the erosions are taking place so swiftly it is almost impossible to keep abreast of them.

The second form of relief we are seeking is through the collective bargaining process—and we are a trade union—imperfect though it may be because we don't represent newsmen on every paper, and because not every publisher, believe it or not, bind himself to protect and defend his employees who find themselves in such difficulties.

But we have negotiated guaranteed wage payments to employees jailed under these circumstances and employer-paid but employee-chosen legal counsel and will continue to do so, law or no law.

I was delighted to hear Mr. Thomas testify earlier this afternoon as to the resources and the attitude of the *Los Angeles Times* in committing itself financially as well as philosophically to the principle involved here. But I am not happy to report that, before he was jailed, Peter Bridge had his salary cutoff by his employer, an equally wealthy corporation. If Congress cannot do it, then the trade union which represents people in this dilemma feels it must provide the protections that a man's family is certainly going to need if he is going to face the pain of jail and long and indeterminate jail sentences while the legalisms, while the protections, are being resolved either before the judiciary or here in the legislative Halls of Congress.

Specifically, we support S. 158 because it comes closest to recognizing newsgatherers' privilege as absolute and unqualified, because it covers Federal and State proceedings, because it does not attempt to draw a distinction between confidentiality and nonconfidentiality, because it covers every medium of communication.

Many before me have gone into greater analysis of S. 158 than this summary permits, but we support it.

It has one provision we find troublesome; namely, that the testimonial privilege would be confined to "unpublished information." If that goes no further than to require verification of what was published or broadcast, perhaps that might not be such a bad qualification. However, we can see some of these ingenious judges who have riddled privilege laws in New Jersey, California, and elsewhere, using such a large leak as this to undo many of the other protections that S. 158 would guarantee.

We would like the subcommittee to take a look at another matter of interest. We can document occasions when employers without knowledge, let alone consent, of their employees have turned over files, published and unpublished photos, verified and unverified information, names, and sources, et cetera, to Government agencies. So the employer himself placed the reporter in the very jeopardy we are seeking to protect him from. We believe such end runs must be stopped by further improving S. 158 to prevent anyone other than an originating news gatherer from disclosing information, material, or sources which the originator could not be required to disclose unless this auxiliary party has the unrevoked consent of the originator to do so.

We don't expect a welcome to this proposal with open arms at bargaining tables across the land, but it is our members and their peers who are going to jail. I admit my admiration for publishers who have said recently the publisher should go to jail, too, though, to by knowledge only two have said that. However attractive the prospect might be to some to have bosses behind bars, instead of their employees, it hardly presents a solution to the problem we are addressing ourselves to this afternoon.

We see no practical way to sort confidential from nonconfidential. It rarely becomes so neatly labeled; the boundaries are not often articulated. The trust between confidant and listener is unusually unspoken, and the relationship is informal.

Fears expressed about cutting off recourse by injured parties in cases of irresponsible and perhaps libelous reporting, in our opinion, were best answered by Senator Thomas Eagleton when he appeared before this committee last week and offered his view that this is a price which simply must be paid in order not to jeopardize the free flow of news.

We are not aware of any foreign aggression against the United States, espionage against the Nation, miscarriages of justice, or lives lost becuse of news gatherer has refused to disclose the information he or she has gathered, or its sources. On the other side of the coin, however, we are mindful of the fact that there is a longstanding tradition of newspeople cooperating with law enforcement endeavors. It is also important to keep in mind during these deliberations we think that no one has proposed or is proposing to forbid newspeople to testify or offer evidence in any forum.

Growing public sentiment for a privilege law can be easily demonstrated. A recent Gallop poll reported that 57 percent in a public poll believe news gatherers should not be required under penalty of imprisonment to reveal the nature of their confidential sources.

A few weeks ago I appeared on a Sunday night San Diego television show called "Telepulse." While a panel and a moderator discuss a topic—in this case, this topic we have been discussing here—the audience cast its vote by telephone on the question of whether newsmen should suffer imprisonment for refusing to disclose their confidential sources. That San Diego audience voted 6 to 1 that they should not.

The telecast was on a Sunday night between 11:30 and 1 o'clock in the morning. I don't know San Diego all that well. I don't know how many were up at that hour, but at least those who were listening to this broadcast voted 6 to 1 that they did not believe newsmen should suffer imprisonment for refusing to disclose their confidential sources.

In a statement to us, Melvin Block, president of the New York State Trial Lawyers Association, called for a shield law for reporters and editors and said his organization endorses and will fight for national legislation to that effect.

"Privileged communications to a reporter perhaps have a greater importance for the betterment of society than those now existing in law," Mr. Block said, going on to cite the traditional privileged relationships we have heard cited so often: doctor-patient, husband-wife, lawyer-client, minister-parishioner—all of which he described as "1-to-1" privileges.

"However," Mr. Block said, "a person communicates to a reporter to cure a societal or political ill; the confidence vested in the reporter by the source and the use the reporter makes of this information does society far greater good than any 1-to-1 communication to those now enjoying existing privilege.

"It is not," he went on, "the battle of the press alone," and concluded, "it is the people's battle to protect reporters from revealing their sources."

Senator, it has been a long and serious afternoon and I would like to conclude with a quote from my prepared testimony. One possible solution was offered by a guild member who works for the Chicago Sun Times. I am sure you will recognize he was writing both in jest and with tongue in cheek.

Gentlemen, Bob Greene, columnist for the *Chicago Sun Times*, wrote in the form of a memorandum addressed to Attorney General Kleindienst, which appeared in the *Bulletin of the American Society of Newspaper Editors*. He wrote as follows:

> . . . Under separate cover you will find my notes. All of them—from the last six months. They have been sitting on the bottom of my locker, and now they are going to be yours . . . .
>
> . . . From now on, every day, you get everything . . . every scrap of paper from my desk to you, every night, before I go home for dinner. What's more, I'm asking every other newspaper reporter in the country to do the same thing . . . news releases and wire services copy and scribbled notes about PTA meetings and letters from persons who want us to help them make the city fix their front doors . . . .

> . . . I'm sorry if some of us forget to put stamps on our packages . . . Some old notes . . . were written on the day before Christmas and they are all about a professor named Moskowitz and a theory he had that Christmas trees could make certain persons suffer allergy attacks . . . .
>
> . . . You will read about Chicago Bar Association meetings, midnight murders on the West Side and weddings of influential socialites . . . .
>
> . . . If you want to get into this game, you have to take the good with the bad. If you want the sexy, exciting notes, you'll just have to put up with the dull ones, too . . . .

Perhaps the proposal will have to be modified to include State attorneys general on the mailing list as well.

Seriously, Mr. Chairman, we are here to urge enactment of legislation to recognize that which the Supreme Court failed to do, the existence of a testimonial privilege for news gatherers. It is our considered opinion that S. 158, the bill introduced by Senator Cranston, would do so more adequately than any other before you.

Senator TUNNEY. Thank you very much, Mr. Perlik.

I would gather from your statement today that you feel that it is an all or nothing proposition, that if we have any exceptions to the absolute privilege that States attorney generals, prosecuting attorneys, defense counsel, will drive a larger and larger wedge into that exception procedure so that after a period of time, in your mind, there would not be a real privilege at all; that you would agree with Justice Douglas that there has to be either an absolute privilege or none at all.

Mr. PERLIK. I am glad, Senator, you have seen through my obscurity.

Senator TUNNEY. Yours was a very interesting statement and I was amused by your final quotation but it does carry more than a single germ of truth, that if we start to fish around into newspapers' notes and fish around in their call lists, thinking especially of situations like Jack Anderson alleges where people with private phones are being called up by FBI agents and being questioned about subjects that are totally unrelated to the Les Whitten case, that we are really undoing the fabric of democracy in this country. So I think that everyone knows that the only way that we can have the kind of freedom in this country that we have had in the past is to protect confidential sources of information. When those confidential sources are giving statements to newspapermen, hoping through the revelation of information, to correct what they consider to be injustice in the society, particularly when those injustices relate to corruption of public officials. I think that for me the most important aspect of these hearings relate to keeping a free flow of information to the public regarding the depredations of the power structure, because I think that once the power structure can totally conrol the news and propagandize the people of the country in an unfettered way, we no longer have democracy.

Mr. PERLIK. I couldn't agree more with anything you said, Senator. It has been a thrilling and enthralling experience, frankly, to sit here during this afternoon and, I think, to see those very views you have expressed taking shape in your mind as various people have come before this microphone and said in other ways what I have tried to convey to the committee as well.

Senator TUNNEY. Well thank you very much, Mr. Perlik.

[The prepared statement follows:]

STATEMENT BY CHARLES A. PERLIK, JR., PRESIDENT, THE NEWSPAPER GUILD, AFL-CIO, CLC[1]

When we appeared before this subcommittee a year ago—during your examination of the general state of press freedom in the United States—we outlined briefly The Newspaper Guild's position on the right of newsgatherers to protect their information and materials as well as their sources from forced disclosure.

Grounded in our view of the purpose of the first amendment's free press guarantee—namely to ensure that the public may be informed of occurrences which may affect it—our position is now as it was them:

That this right exists.

That is is absolute and unqualified.

And that it applies to any information source, confidential or not.

Last year we also expressed our opinion that enactment then of legislation to recognize newsgatherers' testimonial privilege would have been premature. We, along with others, put our faith in the Supreme Court's ability to recognize the privilege in the *Branzburg-Caldwell-Pappas* cases then before it.

We learned of the Supreme Court majority's failure to recognize the privilege as TNG's 39th annual convention was entering its final day. The convention, in an impromptu resolution, echoed Justice Potter Stewart's dissenting opinion that the ruling "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government," and called for enactment of legislation to correct the Supreme Court majority's error.

We are here today to do just that—call for enactment of appropriate legislation.

We also are here to voice our support for S. 158 as, in the view of TNG's International Executive Board, "the most adequate of any [of the bills] presently before the Congress." (I would like to offer for the record copies of the IEB's endorsement of S. 158 made earlier this month and of an IEB expression last October on the necessity of federal privilege legislation covering state as well as federal jurisdictions.)

We support S. 158 because it comes closest to recognizing newsgatherers' privileges as absolute and unqualified; because, recognizing that the first amendment applies uniformly to all persons in all jurisdictions, it would cover both state and federal proceedings; because it does not attempt to draw distinctions between confidential and nonconfidential sources and information; because it recognizes the privilege for every "medium of communication," including the so-called underground as well as the overground press, and because it would cover free lancers as well as regularly employed news people.

There is a provision of S. 158, however, of which we are somewhat dubious: namely that it would confine the privilege for information to "unpublished information." If that qualification would permit compulsion of testimony only to the extent and for the purpose of verifying that information was in fact published or broadcast—in effect to produce and identify clippings or their broadcast equivalent—it may not pose problems. However, we are fearful that in practice this could well become a leak large enough to sink many of the protections otherwise provided by the bill.

There also is an element missing from S. 158 and the other bills before Congress which we feel to be of more than passing importance to the welfare of many of the persons the Guild represents. (The ability of the men and women who seek out and prepare the news to coninue to do so to the best of their ability without direct or indirect interference from any branch or level of government is as much a part of their welfare and the Guild's concern as salary increases of more than 5.5 percent.)

In late 1969 and early 1970 it came to our attention that some managements had been turning over files, containing published and unpublished photographs, verified and unverified information, the names of sources, etc., to government agencies and often doing so without so much as the courtesy of informing the newsgatherers involved. It was sort of an end run around the persons who had established the sources and gathered the information, an end run which jeopardized our members' continuing source relationships and their ability to continue to function effectively as newsgatherers. We are beginning to secure agreements with individual employers prohibiting that sort of action without the express permission of the news persons involved. However, we are of the opinion that to be fully protective of news persons' rights privilege legislation should forbid anyone other than an originating newsgatherer from disclosing information, or material or sources which the originator could not be required to disclose, unless this second or third party has the unrevoked consent of the originator to do so.

---

[1] The Newspaper Guild is the union which represents some 40,000 persons employed in the news and business departments of newspapers, news services, magazines and related enterprises in the United States, Canada and Puerto Rico.

Perhaps it is unnecessary to note that this proposal of ours is not generally met with open arms at the bargaining table or in discussions of proposed privilege legislation with employer representatives. However, it is the people we represent—the working newsgatherers and processors—who most immediately and directly feel the effects of actions which threaten, slow or stop the flow of information and opinion that provides their livelihoods. Similarly it has been working news women and men who have gone to jail for contempt rather than their bosses—though I must admit to some admiration for a couple of publishers who recently have proposed that publishers rather than reporters go to jail when demands are made for disclosure of news sources and information. One of the publishers, William Knowland of the *Oakland Tribune*. I note, by the way, is scheduled to appear before this committee March 1. However attractive the prospect might be to some of bosses behind bars instead of their employees, it hardly presents a solution to the problem.

As this committee is well aware a great deal of discussion has ensued since last June's Supreme Court ruling, but, it seems to us to be not so much over whether there ought to be recognition of testimonial privilege for news people as over the scope of that privilege.

To be sure some in and outside the news industry have said they see no need for legislation. Some hold, as did James J. Kilpatrick before this committee last week, that with the "fearful howl" raised by the industry since the *Branzburg* decision "the situation will take care of itself" since "judges are not deaf." To that we would only say that if "judges are not deaf" some other folks certainly are since the "fearful howl" has been emanating from at least some quarters since 1969 and before.

Many of the questions raised during the discussion of the scope of the privilege to be recognized legislatively have been raised time and again inside the Guild over the years.

Proposals that would restrict the privilege to sources and information bearing the "confidential" label, for instance sound most reasonable on their face. We are at a loss, however, to see how in a great many instances a news person or anyone else can properly sort out that which is "confidential" from that which is not. Not much information gathered in the course of a day's work comes neatly labeled.

This committee heard last week from Vince Blasi of the University of Michigan Law School faculty. His findings on the nature of confidential relationships in an exhaustive study of the subpena issue he undertook at the instigation of The Reporters' Committee on Freedom of the Press also point up the practical pitfalls of the "confidential" qualification.

"Most confidential source relationships are not of a surreptitious cloak-and-dagger character," he notes. "Nor are the boundaries of the confidentiality agreement very often articulated. Usually, the relationship is informal and governed by an unspoken trust on the part of the source. . . ."

How is the existence of confidentiality to be shown, or conversely how is confidentiality to be disproven in the face of its claim?

Fears expressed about cutting off recourse by injured parties in cases of irresponsible and perhaps libelous reporting in our opinion were best answered by Sen. Thomas Eagleton when he appeared before this committee last week and offered his view that "this is a price which simply must be paid in order not to jeopardize the free flow of news."

The variety of circumstances in which some would provide for divestiture of the privilege may also appear reasonable on their face.

Who can really quarrel with the concept of securing information about a threat to human life? Or a threat to the national security?

But when you start considering the potential application of such qualifications in light of the concepts held by some as to what might constitute such conditions the mind boggles at the uncertainty of it all.

What about the threat to life in unsafe auomobiles as first uncovered a few years ago by Ralph Nader? Open season on his sources? And their jobs?

What about charges of undermining the national interest leveled by some a few years ago against the newspeople who went to Hanoi and North Vietnam and reported much that was contrary to official information from the U.S. military at the time? Open season on their notes? What about Seymour Hersh's sources on the MyLai incident?

Even Asst. Atty. Gen. Roger C. Crampton, testifying on behalf of the Administration before a subcommitteee considering privilege legislation in the House, said that "individual federal district judges are not in a good position to determine whether disclosure in a particular instance involves a 'compelling and overriding national interest'."

We are not aware of any foreign aggression against the U.S., espionage against the nation, miscarriages of justice or lives lost because a newsgatherer has refused to disclose information he or she has gathered or its sources.

On the other side of the coin, however, we are very mindful of the fact that there is a longstanding tradition of newspeople cooperating with law-enforcement endeavors.

It also is important to keep in mind during these deliberations, we think, that no one has proposed or is proposing to forbid newspeople to testify or offer evidence in any forum.

Should Congress fail to provide legislative recognition for newsgatherers' testimonial privilege, or enact legislation providing qualificatons which may prove to be worse than no legislation at all, perhaps it will be time for the Guild and others to consider promoting a scheme advanced, in just I think, by one of the members of the Chicago Guild, Bob Greene, a columnist for the Chiacgo Sun-Times.

In the form of a memorandum addressed to Atty. Gen. Kleindienst appearing in The Bulletin of the American Society of Newspaper Editors, Greene writes as follows:

". . . Under separate cover you will find my notes. All of them—from the last six months. They have been sitting on the bottom of my locker, and now they are going to be yours. . . .

". . . From now on, every day, you get everything . . . every scrap of paper from my desk to you, every night, before I go home for dinner. What's more, I'm asking every other newspaper reporter in the country to do the same thing . . . news releases and wire services copy and scribbled notes about PTA meetings and letters from persons who want us to help them make the city fix their front doors. . . .

". . . I'm sorry if some of us forget to put stamps on our packages. . . . Some old notes . . . were written on the day before Christmas and they are all about a professor named Moskowitz and a theory he had that Christmas trees could make certain persons suffer allergy attacks. . . .

". . . You will read about Chicago Bar Assn. meetings, midnight murders on the West Side and weddings of influential socialities. . . .

". . . If you want to get into this game, you have to take the good with the bad. If you want the sexy, exciting notes, you'll just have to put with the dull ones, too. . . ."

Perhaps the proposal will have to be modified to include state attorneys general on the mailing list as well.

Seriously, Mr. Chairman, we are here to urge enactment of legislation to recognize that which the Supreme Court failed to do, the existence of a testimonial privilege for newsgatherers. It is our considered opinion that S. 158, the bill introduced by Senator Cranston, would do so more adequately then any other before you.

RESOLUTION BY THE INTERNATIONAL EXECUTIVE BOARD, THE NEWSPAPER GUILD, AFL-CIO, CLC, ADOPTED FEBRUARY 1, 1973

With the 93rd U.S. Congress not yet a month into its first session a number of bills have been introduced in both the House of Representatives and the Senate with the stated purpose of correcting the error of the Supreme Court in failing to recognize newsgatherers' right to protect their sources, materials and information from forced disclosure.

It has long been The Newspaper Guild's position that this right is absolute and uniqualified under the First Amendment.

The International Executive Board of The Newspaper Guild notes with regret that the majority of the bills presently before Congress would recognize the privilege only as a qualified one, however, subject to divestiture under a variety of circumstances, and that many of the bills would apply only at the federal level.

Identical bills bearing the title "Free Flow of Information Act," have been introduced by Senator Alan Cranston and Rep. Jerome R. Waldie, both of California. Representatives of some two score organizations connected with the news industry participiated in drafting the measures, including TNG, the American Newspaper Publishers' Association, the National Association of Broadcasters, the American Society of Newspaper Editors, Sigma Delta Chi, the Radio Television News Directors Association, Newsweek magazine, CBS and NBC.

The Cranston-Waldie bills would recognize newsgatherers' testimonial privilege as absolute and unqualified, except that they would permit subpenas only for the purpose of verifying that information was broadcast or published.

Recognizing that the First Amendment applies uniformly to all persons in all jurisidictions the Cranston-Waldie bills would apply the privilege to proceedings at both the state and federal levels of government.

The Cranston-Waldie bills cover every "medium of communication" including both "overground" and "underground" publications.

The IEB of TNG finds the Cranston-Waldie bills to be the most adequate of any presently before the Congress and calls upon the Congress to enact them with only a single amendment: to forbid any person who acquires custody of news documents or learns of a newsperson's information or sources through association with a newsperson from disclosing same without the written and unrevoked consent of the originating newsgatherer, the primary holder of the information and/or source.

At the same time, the IEB of TNG urges the Congress to examine closely and reject new rules of evidence proposed by the Supreme Court for all U.S. courts and magistrates.

Not only do they fail to recognize newsgatherers' testimonial privilege under any circumstances, but it appears to us, their expansion of the general prohibition against heresay or second-hand evidence could well in fact encourage attempts to force newsgatherers to discolse their sources, information and materials. (That the makers of the proposed rules have little regard for privileged communications seem amply demonstrated in the proposed narrowing of the doctor-patient privilege to psychotherapists and elimination of the husband-wife privilege in civil cases and Mann Act prosecutions.)

We also are advised that the propsed expansion of the government's "state secret" privilege to broadly defined "other official information" would in effect reverse the principle that public documents should be available to the public unless the government can show good reasons for withholding them, shifting the burden to the person seeking disclosure from his government.

We commend those members of Congress who have expressed concern over the proposed new rules, especially Sen. Sam Ervin, and urge them to remain steadfast in their announced intention to act to postpone automatic adoption of them within 90 days of their official transmittal to Congress.

RESOLUTION BY THE INTERNATIONAL NEWSPAPER GUILD, AFL–CIO, CLC, ADOPTED OCTOBER 26, 1972

It's open season on newsgatherers again since a majority of [illegible] U.S. Supreme Court refused to recognize the First Amendment r[illegible] to maint[illegible] the confidentiality of news sources and information.

Maryland's highest court refused to overturn a 30-day j[illegible] sentence given Baltimore Sun reporter David M. Lightman when he refused to [illegible] a grand jury the person he reported had offered him marijuana.

California's highest court has refused to hea[illegible] appeal of [illegible]ite jail sentence for former *Los Angeles Herald-Examiner* reporter W[illegible]rr, who refused to disclose sources of stories about the Charles Manson [illegible] case.

A New York state Supreme Court Justice has ordered two [illegible] television newsmen to tell a grand jury what they saw during the Attica [illegible] revolt.

A Kentucky state court has sentenced reporter Paul M. Br[illegible]rg to six months in jail for refusing to identify two persons he watch[illegible] hashish. Branzburg, one of the principals in this summer's Suprem[illegible] is now working for the *Detroit Free Press.*

In Tennessee, *Memphis Commercial Appeal* reporter Joe [illegible] faces a contempt charge for refusing to tell a state senate committee the sources of stories on child abuse at a state mental hospital.

In Delaware an attorney general is attempting to subpena the *Wilmington News-Journal's* unpublished negatives of an anti-busing rally.

In Florida, a defendant facing trial on charges stemming from the Watergate "bugging" case has secured subpenas for files, tapes and transcripts about the case from AP, UPI and 33 radio and 6 television stations in the Miami area.

And in New Jersey, former *Newark News* reporter Peter Bridge was jailed early this month for refusing to give a grand jury unpublished information about and official's statement that she had been offered a bribe. New Jersey's highest court refused to overturn Bridge's contempt citation and the U.S. Supreme Court refused to stay his sentence.

Several, including Guild members and at least one local, Seattle-Tacoma, have undertaken to provide funds to assist in an announced appeal of the substance of Bridge's case to the U.S. Supreme Court.

The Bridge case, along with the growing list of others, has provided renewed currency to the proposal first advanced by the Guild and endorsed by TNG's Convention in 1970: that efforts be undertaken toward formation of a media workers' legal aid fund which would furnish legal assistance to media personnel requiring counsel to defend against subpenas, to ensure freedom from other interference in the pursuit of their work and for similar purposes.

The IEB therefore calls upon TNG's officers to once again undertake to have the American Civil Liberties Union, or some other appropriate organization, convene a meeting of media management and employee organizations for the purpose of establishing such a fund, with the understanding that Guild participation in such a fund would be conditional on a program consistent with TNG's basic policies.

In the *Bridge* case, as well as those cited in Maryland, California, New York and Kentucky, state laws seemingly prohibiting forced disclosure by newsgatherers seem to have had little effect except perhaps to stimulate the imaginations of those seeking to circumvent them. (In New York, for example, despite the fact that the word "confidential" appears nowhere in the state's "privilege" law, the court, citing the July 29 Supreme Court decisions, ruled that the newsmen must prove their sources were confidential before the state law could protect them.)

Clearly, state legislation has been inadequate, especially since the Supreme Court's ruling. Clearly, unambiguous and unqualified federal recognition of newsgatherers' right to protect their ability to practice their craft is called for; a federal law to apply at all levels of government—state and local as well as federal, as TNG President Charles A. Perlik Jr., called for earlier this month before a congressional committee. As he said: The First Amendment contains rights extending uniformly to all states and all individuals.

The IEB therefore calls upon the 93rd Congress to give top priority to enactment of legislation recognizing newsgatherers' absolute and unqualified privilege when it convenes in January and commends to its attention TNG's model draft legislation which would remove the threat of forced disclosure as an impediment to the proper functioning of newsgatherers and thus as a restriction on the public's access to the news.

The IEB also reminds all Guild locals that the Bridge and other cases since the Supreme Court's denial of privilege also give added urgency to universal achievement of the provisions of TNG's Collective Bargaining Program to forbid an employer to disclose file materials without permission of the newsgatherers involved, to require an employer to support newspersons refusing to honor a demand for disclosure and to guarantee that none will lose income or employment as a result of that refusal.

Our hearing list is complete today and we will recess until 10 a.m., March 13, when we will meet in room 318 of the Russell Senate Office Building.

Thank you.

Mr. PERLIK. Thank you.

[Whereupon, at 4:35 p.m. the committee was adjourned until Tuesday, March 13, 1973, at 10 a.m.]

NEWSMEN'S PRIVILEGE HEARINGS

TUESDAY, MARCH 13, 1973

U.S. Senate,
Subcommittee on Constitutional Rights
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 318, Russell Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin (presiding) and Tunney.

Also present: Lawrence M. Baskir, chief counsel and staff director; Britt Snider, counsel.

Senator **Ervin**. The subcommittee will come to order. I have an opening statement which I will place into the record before testimony of our first witness.

[The opening statement of Senator Ervin follows:]

Statement of Senator Sam J. Ervin, Jr., March 13, 1973

Today the Subcommittee continues its inquiry into the so-called "newsmen's privilege" proposals. Since our last session, I have introduced a new bill which treats this subject. Eleven senators have joined me in cosponsoring it.

This new bill represents my third attempt at drafting legislation which will accommodate both the interest of society in law enforcement, and the interest of society in preserving a free flow of information to the public. I have been attempting to draft a bill which would strike this balance, and as everyone who has attempted the task knows, this is no easy exercise. While I am certain that it can be improved, in my judgment this bill strikes a reasonable balance between these necessary, if at times competing, objectives.

The bill provides qualified protection for a newsman's sources and for his unpublished materials. A newsman, under the bill, is entitled to refuse to reveal to a governmental body the name of his source of information if he gave a contemporaneous assurance to the source, either express or implied, that the identity of the source would not be disclosed. Furthermore, the information must have been obtained in the course of the newsman's occupation. Unpublished information is also protected from disclosure if it was gathered in the course of the newsman's occupation.

It is important to note that, despite these provisions, the newsman is not excused from testifying to the identity of any person who commits a crime in his presence. This provides a clear standard which puts both newsmen and sources on notice that where the newsmen has viewed a criminal act, whether or not as a result of his pledge of confidentiality, he may later be compelled to identify the perpetrator of that act. This provision provides a small qualification to the general privilege conferred by the bill. But it is a necessary and reasonable exception. No newsman would lightly conceal a crime from public authorities, and no newsman should have a right to keep this information from the police. Yet to conform to the exception will require little imposition on the part of the newsman. He need only tell his source: "The law will protect against my having to disclose your name. But I cannot hide your identity if you are committing a crime." These terms are reasonable to any man, and will not interfere with the normal and necessary reporting and informing function of the journalist.

I should also make special mention that the provisions of this new bill would apply to both federal and state governments. This represents a departure from my earlier bills which applied only to federal jurisdictions. I have been convinced during the course of these hearings that inclusion of the states is within the power of Congress to regulate interstate commerce and, moreover, is desirable. A shield law which only applied to the federal courts would not fulfill its objective of protecting the free flow of information. If a uniform shield law were not in effect, neither sources nor newsmen could be assured that they would not be subpoenaed before state tribunals where the testimonial privilege was different or did not apply. I would point out that the states would be free, under my bill, to provide greater protection for the newsman if they so desire. My bill only sets minimum standards.

As I stated at the outset, this legislation represents an attempt to reconcile two sometimes competing interests of society: The preservation of a free flow of information to the public, and the administration of justice. Giving the newsman the right to withhold the identity of all sources of information, however obtained, as some bills provide, would seem to weigh the balance too strongly in favor of the newsman, and carry a great potential for abuse. There is no need to allow the newsman to protect a source if the source did not ask for protection. Nor is any interest served by allowing a newsman to refuse to testify about an event which he saw while not performing his job. Similarly, the interest of society in identifying and punishing violators of its laws is too vital to allow newsmen to refuse to testify about a crime committed in their presence. To be sure, there is value in informing the public about the perpetration of a crime in the community, but as Justice White so succinctly stated in the *Caldwell* decision: "Is it better to write about crime than to do something about it?" It is my opinion that where the newsman has personal and eyewitness knowledge of a crime, society has a greater interest in having the perpetrator of that crime identified and punished, than simply in being made aware of it.

I am just as persuaded, nonetheless, that law enforcement should not be able to make the newsman its tool, when to do so would destroy his effectiveness and his credibility. The newsman is dependent upon confidential disclosures made by inside sources of information. Practically no information is made public concerning corruption and mismanagement in government, business, labor, organized crime and the military, except by virtue of inside sources who feel compelled to reveal it. If these sources are allowed to "dry up" for fear of ultimate exposure, the public loses information which is necessary to the improvement of its social and political processes. The detriment to society is potentially devastating.

Of similar concern to newsmen is the government's ability to obtain their unpublished notes, tapes, pictures and stories. These "work products" may be unreliable and uncorroborated. They may simply represent poor work and for that reason were never published. To allow the government to obtain them may well undermine the newsman's credibility and integrity. To make them subject to exposure might well result in newsmen simply not taking notes or quickly destroying them, as many reporters have been doing since the *Caldwell* case. A newsman's job, as has been forcefully presented at these hearings, is to report news, not conceal it. The unpublished notes represent matter which is unsubstantiated, irrelevant, rumor, or not newsworthy. It is rare that the notes might contain information of any use at a trial. Making them subject to disclosure involves a high price of interference with the First Amendment, for a very low and uncertain return in law enforcement.

I have dealt with the provisions and underlying premises of this bill at some length in hopes of clarifying my own position. I would also hope to have provoked some comment from our remaining witnesses.

The first witness this morning is Senator Mark Hatfield. I understand you have to leave very shortly. Most of us have too many jobs to get around to. Please proceed, Senator.

STATEMENT OF HON. MARK HATFIELD, U.S. SENATOR FROM THE STATE OF OREGON

Senator Hatfield. Thank you very much, Mr. Chairman.

Mr. Chairman, I am here this morning to testify on behalf of legislation which should never have become necessary. For nearly 200 years, the first amendment has guaranteed the people access to a free flow of information by preserving and protecting the press' function of gathering and disseminating news and opinion. But now that function is threatened by judicial interference and legislation is required.

At the time of its writing the first amendment must have seemed foolish to some, even as it does to some today, for newspapers in the early days of our Republic were frequently little more than scandalous, polemical broadsides. Even Thomas Jefferson was once prompted to write, "nothing can now be believed which is seen in a newspaper." But the Founding Fathers had the wisdom and discern that the quality of the publication was not the Government's business, but the people's and in order for the people to be the judge of the press' integrity, it had to be protected from Government control.

Simply put, the first amendment means that the people, not the Government, are the arbiters of truth, and this has to be so for democracy to survive. As Justice Learned Hand said, "the first amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all."

Apparently we have lost sight, Mr. Chairman, of that vision, and the crux of our free society is threatened. For since the Supreme Court's decision in the case of *Branzburg* v. *Hayes*, the courts have seen fit to issue subpenas and harsh contempt of court rulings that threaten the people's right to know by interfering with the press' news-gathering and reporting activities.

I do not believe that I need to dwell at length on the implications of the Court's ruling. We would not be here today if this were a matter of little consequence. But I would like to refer to one episode before moving on to a discussion of my bill.

In 1966, Miss Annette Buchanan, editor of an Oregon student newspaper, was called upon to divulge the identities of unnamed persons referred to in a story about marijuana use among students. She refused to disclose this information, pleading a protection against such disclosure under the first amendment. But the Oregon Supreme Court found that the first amendment did not afford such protection, and ordered Miss Buchanan to comply with the order. She did not, and was fined for contempt of court.

I have mentioned the case of Miss Buchanan to illustrate that judicial interference with the press did not originate with the *Caldwell* case, nor is it confined to well-known reporters working for prestigious newspapers. It is important to remember that what is at stake here is not just the rights of a few large newspapers or wire services, but also the rights of the small dailies and weeklies throughout the country. Indeed, the protection of these rights may be more important to small newspapers and broadcast stations, for they lack the legal and financial resources to combat a flurry of subpenas. If they are forced out of business because of high court costs, our supply of information will be limited further.

Free from interference, the press is able to provide us with information on what is happening in all levels of government. Without that information we would have only the unchallenged assertions of public officials themselves, making it virtually impossible for us to make informed judgments placing blame where it belongs, giving credit where it is due.

Our right to know does not merely extend to the relationship between the press and government, however. The press reports on the entire society—its truth and its sham, its beauty and its ugliness. Without such knowledge about all aspects of society, the people cannot respond in a rational and principled way. Newsmen's efforts to penetrate the hostility and suspicion of dissident groups will be impeded if these groups feel that anything newsmen learn will be subject to forced disclosure. Any disruption of the already tenuous channels of communication between alienated segments of our society is a loss we can ill afford.

I have therefore introduced Senate bill 451, to protect newsmen from forced disclosure of their confidential sources of information, except when a newsman is the defendant in a libel action. I have made no attempt to define who is a newsman, for I do wish to limit this protection to those who qualify under some professional standard, or those whom newsmen themselves define as newsmen. Nor should this privilege extend only to professionals, but to amateurs as well. Student reporters, like Annette Buchanan, are not professionals, but the information they supply can be as vital to our society as that of professional reporters.

I would also like to point out that this privilege extends to those "independently engaged in gathering information for publication or broadcast," so that free-lance journalists and authors will also be protected.

I have qualified an absolute privilege by prohibiting a newsman from claiming the privilege when he is the defendant in a libel action. Thus a newsman, if sued for libel, may not attribute allegedly defamatory information to a "reliable source" and then use that source in his defense without identifying him.

Sixth amendment rights are involved in the granting of any testimonial privilege, and particularly so in this instance. We should not allow the press to escape accountability to the public for the publication of defamatory information.

It has been argued that this qualification will expose newsmen to court action from irate public officials whose record has been criticized by the press, and in that court action the newsmen's confidential sources will be disclosed. I do not believe that will happen, if my understanding of the Eighth Circuit Court of Appeals ruling in the case of *Cervantes* v. *Time, Inc.*, is correct. In that decision, the court ruled that since the plaintiff was a public official, there had to be a concrete showing based on evidence apart from that supplied by the reporter, which indicated that the reporter had acted with malice or in reckless disregard of the truth.

Beyond this one exception to an absolute privilege, I feel further qualifications will erode the basic intent of the bill and subject the press to continued judicial interference. To rescind the privilege on the grounds of "overriding national interest," for example, makes the integrity of the privilege fluctuate along with the vagaries of partisan politics. I doubt very much that it was in the "overriding national interest" to send Earl Caldwell to jail for withholding information on the activities of the Black Panthers.

Perhaps this would not be a problem if the Government, despite announced intentions to the contrary, had not lapsed into classification of great volumes of documents. The people, not just the Government, have a stake in determining what constitutes the national interest. They must have information on what their Government is doing for them, to them, or in their name before they can make rational judgments as voters. This was a principal reason for my support of Senator Ervin's bill to extend the time period for congressional consideration of the proposed new rules of evidence. Rule 509 would protect both secrets of state and so-called official information from disclosure in judicial proceedings, and give Government officials the sole power to decide what the people should know.

Even now, precious little information about Government operations escapes the labyrinth of the Federal bureaucracy or the Congress. Frequently, the only information we have is obtained through "leaks" by confidential sources. While we press for declassification of Government documents and open congressional committee hearings, we must protect these sources. The cases of Ernest Fitzgerald and Gordon Rule indicate what will happen if confidential sources are forced to reveal themselves as the sources of information embarrassing to the Government.

Nor do I believe that the privilege should be divested if the information sought is unobtainable from other sources. We should not compel the press to do what law enforcement agencies cannot or will not do for themselves. To do so would make the press an investigative arm of the Government, which would, in Justice Potter Stewart's words, "harm rather than help the administration of justice."

Finally, you will note, Mr. Chairman, that my bill does not extend to the states. I urge the states to enact newsmen's privilege legislation, and I am pleased that the Oregon Legislature is considering a bill very similar to my own. But I do not believe that the Congress has the authority to impose what is essentially a rule of evidence on the state courts. This was another of my objections to the proposed new rules of evidence, and why I supported the move to prolong consideration by the Congress.

There is a sense in which I regret our being there today. Perhaps this issue would have been better resolved in the courts on a case-by-case basis, as it has been in the past. But these hearings on this issue may serve as a beginning for the examination of broad issues concerning first amendment freedoms. Shield legislation for newsmen should serve as a catalyst for our consideration of the overclassification of documents, claims of executive privilege, congressional procedures, accessibility to the media, monopolization of the media, control of both commercial and public broadcasting, grand jury procedures, and court "gag orders," to mention a few.

As A. M. Rosenthal recently wrote, "We have come to the point, sorrowfully, where we really do not expect our Governments to tell the whole truth or even a goodly part of it." A number of citizens would level the same charges at the press. If this situation is to be favorably resolved so that the people will be able to trust those that inform them, we must first act to protect the press from the Government, and then move to set our own house in order so that the people's confidence in their Government can be restored.

Thank you very much.

Senator **Ervin**. I take it from your statement that you accept the principle that it would be virtually impossible for our institutions of government to operate efficiently and free from corruption except for a free press?

Senator HATFIELD. Precisely, Mr. Chairman. I feel this is not just an opinion that I would express to you this morning, but I feel that a very cursory review of history of our Government, at the Federal, State, and local levels, provides ample evidence to prove this point.

Senator ERVIN. You stated in substance, by a quotation from Justice Potter Stewart, that law enforcement is aided by the fact that investigative reporters turn up many violations of the criminal laws.

Senator HATFIELD. It seems to me that again we have the evidence of history to prove that an alert and an investigative press has brought public attention to focus upon many of the ills of society as well as political corruption and that through this kind of reporting law enforcement agents have attended to the implementation of their duties and responsibilities because of this reporting.

Senator ERVIN. Now, isn't the work of the investigative reporters the best assurance we have that where there is corruption or inefficiency in government, it will be revealed?

Senator HATFIELD. Well, Mr. Chairman, the only other option we have in that is to provide the people who are guilty of such corruption or who stand to be found guilty of such corruption a monopoly on that corruption, a protection to continue that corruption, because they are not going to come forth with a confession to the public. They aren't going to be involved in a disclosure. They are going to protect their corruption, and it is only through this kind of investigative press that we have hopes of finding out about this corruption.

Senator ERVIN. And about the surest way in which an investigative reporter can ascertain that there is corruption or inefficiency in government is through confidential communications made to him by somebody who is on the inside and knows about it.

Senator HATFIELD. I am thoroughly convinced that there are men of conscience in high positions and in all positions relating to these cases where we have the corruption, and that their consciences dictate that they must somehow expedite their role to disclose this information. They find that perhaps they are in a structural arrangement in a hierarchial relationship which does not permit them to go to some other official in that government or within that echelon of government, and therefore, their only hope of exposing thereby the dictates of conscience is to go to a press person, who in turn will carefully review it and interrogate that person and report that.

Senator ERVIN. If these people whom I would call inside informants, for lack of a more appropriate term, were under the apprehension that their identity would be revealed or could be revealed, they would be less likely to communicate the information they know about corruption and inefficiency to a reporter; would they not?

Senator HATFIELD. I think there is no question about that.

Senator ERVIN. I think you cited two examples. Ernest Fitzgerald and Gordon Rule reported to Congress what they considered to be inefficiency in government, and they suffered severe penalties on account of it.

Senator HATFIELD. Mr. Chairman, that is not only true as they related to those particular cases and as they related to the press, but I think we would find that true within our Government. Those who have administrative responsibilities have to oftentimes depend upon information given them as to the excellence or poverty of administrative policies that are being carried out in their name or under their jurisdiction. So we exercise that within the structure.

Senator **Ervin**. In other words, it promotes efficiency in government by communications within the structure of government as well as by communications with the press.

Senator **Hatfield**. Exactly. I think you and I recall the role made by our former colleague, Senator John Williams of Delaware, and I recall many times in discussing some of his rather renowned cases of exposure of corruption of how he had information and sources of information that he protected as a U.S. Senator. So I think this is again evidence of this kind of relationship that does exist between those who are interested in exposing corruption and their ability to develop the information to do so.

Senator **Ervin**. That is a very fine illustration. Senator Williams stirred the Government into various actions on many occasions.

Thank you very much for a most illuminating discussion.

Mr. **Baskir**. Mr. Chairman, our next witness is Ogden Reid, Member of Congress from New York.

Senator **Ervin**. I want to welcome you to the committee and commend your interest which has always prompted you to fight for the freedom of the press.

STATEMENT OF HON. OGDEN R. REID, A REPRESENTATIVE IN CONGRESS FROM THE 26TH DISTRICT OF THE STATE OF NEW YORK

Mr. **Reid**. Thank you very much, Mr. Chairman. It is a distinct privilege to be with you this morning.

I do want to say I feel strongly about your efforts, about a strong Constitution and free flow of news and information to the public, and I think your committee is rendering, in my judgment, perhaps the most important duties of the Members of Congress at this point. I think your recent contributions have been something that is important.

Senator **Ervin**. It is encouraging to this committee that you have aligned yourself with it and upheld its efforts.

Mr. **Reid**. I thank you.

Before starting my testimony perhaps you will permit me to tell something which I guess goes to the thrust of my argument.

Some years ago when I was with the *Herald Tribune*, Tito Gainz Paz came to my office. He was publisher of *La Prensa* in exile from Argentina. He talked about the problems of publishing a newspaper in the days of tyranny. Parenthetically, I hope those problems don't return. But he ended his comment to me by saying, Mr. Reid, I hope you will remember one thing if you remember nothing else, and that is that it is my experience, learned from some painful lessons, that you have freedom of the press or you do not, and that there is nothing in between. I have always remembered that because I thought it was something of the voice of experience. I must allow that I had not expected to have to remember that when the freedom of the press would be endangered in this country, but indeed we find that is the case. Abe Rosenthal of the *New York Times*, who was expelled from Poland also said in testimony recently before the House that at that time he had not expected ever to have to come to Washington to defend freedom of the press either. But this is the condition we all find ourselves in.

With that background I would like to touch on certain aspects of the testimony, if I may.

At the earlier hearings on this subject last September, I argued for a qualified privilege for newsmen against compulsory disclosure of confidential information or sources. Today I hold that this privilege must be absolute and unqualified.

I have reached this conclusion because in the past several months courts in various States with "newsman's privilege" statutes on the books have found ways to emasculate these laws and to strip away the protection which they were intended to confer on newsmen.

As a result, at least three news reporters have been thrown in jail in such States—New York [Edwin A. Goodman], New Jersey [Peter Bridge], and California [William Farr]. Many other around the country have been threatened with jail.

In each instance of jailing, the statute was too narrowly or too loosely drafted to prevent the courts from circumscribing its applicability so drastically, in apparent violation of legislative intent, that it effectively provided no protection whatsoever.

Thus, the inescapable danger of attempting to enact a qualified or otherwise non-comprehensive "shield" law is the certainty that the courts could and in many instances will find real or imagined loopholes in it wide enough for aggressive government prosecutors and investigators to drive trucks through.

If exceptions for "national interest" and "national security" are adopted in a Federal "shield" law, what imaginative prosecutor could not cite a thousand different ways in which these interests would be threatened unless this or that reporter told what he knew? Parenthetically, I would also add that I think an absolute bill is important to cover both published as well as unpublished material. In point of fact, on the *Herald Tribune* many editorials that were published, nonetheless were based on a great deal of confidential information. If the notes and reports were required in connection with that kind of piece I think any newspaper would suffer editorially. Equally I think the definition of newsman or news medium must be very broad as well.

What is the "national interest" or the "national security" anyway? If one thinks they can be defined with sufficient precision to preclude abuses, one need only reflect on the wholesale and in some cases outrageous abuses of security classifications by the executive branch in spite of security classifications by the executive branch in spite of extensive definitions and restrictive language in the applicable Executive orders. Mr. Chairman, as John Moss and I have been concerned over freedom of information over a period of time and how to draft a national statute, we put in that law a very tight definition. The purport really was to say national security really on the highest level, and top secret sensitive, which was an amendment by the Executive, really was meant to deal with the matters of the highest national interest, invasion, foreign aggression, matters of that kind. We have found there has been very substantial and progressive erosion. I have come to the conclusion after listening to testimony on the Pentagon

Papers that "national security" as a loophole would be a very wide one indeed, and I am afraid the record sustains that.

I have tried to work with some attorneys who have analyzed the various cases. They have analyzed the jailing of journalists and the interpretations by State courts of newsmen's privilege laws and obviously taking a little bit of a look at some of the statements of the present administration. Accordingly, our bill was drafted with the thought in mind that it would meet some of the cases wherein the shield law, in some cases allegedly almost absolute shields, did not prove to be that in fact.

In the case involving reporter William Farr in Los Angeles (*Farr* v. *Superior Court*, County of Los Angeles. 99 Cal Reptr. 342, 22 Cal. App. 3d 63,1972), the court held the California privilege statute inapplicable in part because Farr was no longer a reporter at the time he claimed the privilege, even though he had been a reporter at the time he received the confidential information. Whatever else may be said of this opinion it is logically impossible to defend the proposition that such statutes could do any good if reporters who once leave the profession are then required to testify as to confidences obtained during the course of their work as journalists.

The court in the *Farr* case also held that since the trial judge in the *Manson* case had barred communication between all lawyers and the press, no statute, however broadly phrased, could prevent the judge from requiring the reporter, under pain of contempt, to testify as to the nature of any violation of his order. In this fashion, the California statute was upended and the reporter, instead of being protected against forced testimony as his source, was held required to testify precisely because the judge wanted to know who the source was.

In the New Jersey case involving reporter Peter Bridge (*In the Matter of Peter Bridge, Charged with Contempt of Court*, 120 N.J. Super. 460, 295 A 2d 3, 1972), the New Jersey shield law, was ruled inapplicable in that particular case because of a separate rule of evidence which the courts declared to be controlling. Yet, as Mr. Bridge has testified, that other controlling rule of evidence was never intended to override the shield law, but was drafted for the wholly unrelated purpose of requiring a witness who had testified on direct examination to be responsive to cross-examination on the same matter. Largely in reaction to this case, the New Jersey Legislature shortly thereafter overwhelmingly passed a broad, comprehensive, and absolute privilege bill to prevent a similar judicial abuses in the future.

The New York shield law has been evaded by the New York courts in three separate cases, on a different ground in each one.

The general manager of New York City Radio Station WPAI–FM, Edwin A. Goodman, was jailed last year for relying on the State shield law in refusing to turn over to a grand jury the tapes of telephone conversations made with unidentified prison inmates and broadcast live during the course of a prison rebellion. The court ignored the possibility that the tapes would be used by law enforcement authorities to identify the prisoners through voiceprints, and ruled that the law's protection against disclosure of news sources did not apply. The court also ignored the fact that the statute does not divest the privilege even in cases where the content of the information has previously been published.

A second case involving WBAI-FM (*Matter of WBAI-FM*, 68 Misc. 2d 355, 1971) further distorted the New York shield law when the court ruled that the privilege against disclosure did not apply if the unidentified source was the one who initiated contact with the newsman, rather than vice versa. The law contains no requirement whatsoever that the newsman must affirmatively have sought out the source, as opposed to having the source come to him. Since the purpose of the law is to encourage news sources to furnish information to the press, the court's opinion seems devoid of logic.

In yet a third case (*People* v. *Wolf*, 333 N.Y.S. 2d 299, 1972), the court read into the New York shield law interpretations resulting in still further emasculation of the protection for newsmen. The law, which includes no reference to confidentiality as a precondition for applicability, was held to require a confidential relationship between the reporter and his source. Absent such a relationship, the court held, the statute gave the reporter no protection.

All these decisions prove a clear unwillingness by the judiciary to give any but the most grudging interpretations to newsmen's shield laws.

In large measure the attitudes of the courts emanate from the attitudes certainly in part of the Government prosecutors and investigators who urge on them the most limited possible application of the shield laws. Government attorneys have not been known lately for their sensitivity to the fundamental first amendment principles of free press and the public's right to know.

All this reflects the broader climate of official hostility to the press which continues to characterize this administration.

Two great newspapers were restrained in 1971 from publishing information which the administration found embarrassing.

The first time, as we all know, in the history of our country that this occurred.

Broadcast stations have been threatened with loss of their licenses if they continue to report the news in a manner found inadequate by Government officials.

On the most spurious charges imaginable, the administration alledgedly ordered the arrest a few weeks ago of a crusading reporter whose revelations about the Government's shabby and dishonest treatment of American Indians did not sit well with people in high places.

While arresting one reporter, the administration has been caught ordering an FBI investigation on another.

Pursuant to offensive Justice Department guidelines, which presume to vest in the Justice Department powers which I believe to be fundamentally inconsistent with first amendment principles, newsmen have been hauled before courts and grand juries in efforts to pry confidential information from them.

In this climate, I believe, it would be the gravest mistake for Congress to rely on the forbearance of either the executive branch or the judiciary in implementing any qualified shield law. If past experience is any guide, statutes which are qualified or otherwise imprecise provide only illusory protection. I can recognize, Mr. Chairman, and I agree with the balance you have sought to strike, the preservation of the free flow of information on the one hand and the administration of justice on the other and quite obviously we want to always maintain that balance. But I believe, and I will detail briefly a few elements of our bill, that it is important not to chip away at the first amendment either in the process of striking the balance. Toward this end I have introduced H.R. 3482, First Amendment Protection Act of 1973. I would hope, like you, that this would not have been necessary. I would have hoped the Supreme Court would have ruled somewhat differently. The fact is the Court did not and invited the attention of the Congress as broadly or as narrowly as we deem necessary to meet the abuse.

Our blil's essential features are absolute and totally unqualified privilege against compulsory disclosure before any Federal body of information or sources of information obtained or received by person or organization while acting in the capacity of a journalist or news media.

Two, conferral of this privilege with respect to both published and unpublished, including a person's mental knowledge, reporting, photographs, notes, and information of any information whatsoever.

Three, a comprehensive definition of journalists as including any employee or agent of a newspaper, magazine, radio or television station or network or wire news service or book, including an author. Comprehensive definition of news medium as including any newspaper, magazine or other periodical, radio, television or network, book or pamphlet, or wire or news service and any employee, operator, publisher, or agent thereof.

Mr. Chairman, I allow, and it is clear, I think, that the protection against disclosure by this bill is intended to be comprehensive, absolute, and totally without exception.

It applies to any person, including book authors, who are in any manner involved in the process of disseminating information to the public—from those who initially gather the information to those who transmit it to the public, and everyone connected with the process in between. This is to insure that information protected from disclosure by a reporter cannot be obtained by subpenaing the typesetter or the copy boy.

It should further be noted that my bill safeguards not only unpublished information, but published information as well. Compelling journalists to testify as to what they have witnessed and written about inevitably leads to demands for notes, out-takes, and the like in order to test the accuracy of what was reported. Precisely this kind of situation occurred recently in the Watergate criminal trial, in which the defense sought the unpublished tape recordings of a *Los Angeles Times* interview with a key prosecution witness in order to test the accuracy of the witness' testimony at the trial. When the newspaper refused a court order to furnish the tapes, its Washington bureau chief, John Lawrence, was ordered jailed.

In a broader sense, compelling a journalist to testify as to published information changes his function from that of the reporter-observer he should be to that of an informer, a police agent, or a witness. I do not believe reporters should be put in this position, where they become investigating arms of the Government. What we are concerned about, I think, is the fundamental protection not just of the press or of radio or TV, which I believe are fully protected by first amendment rights, even though they weren't invented at that time. But what we are trying to deal with, it seems to me, is the public's right to know, the future of the fourth estate. I have lived in countries and reported in some where there was not a free press and I never want to see that climate or that condition come to this country because I think if we once lose freedom of the press and in a sense a fourth branch of government, then all other freedoms are in jeopardy as well.

What we are trying to talk to here this morning really and testify to is that it is not just the reporter, the newsman, the editorial page, the climate, the fear today of many of the reporters that whenever they write a story that is sensitive they may go to jail, prior restraint or other procedures might be threatened or invoked, the concern that has already permeated—Walter Cronkite wrote about this in an interview with the *New York Times* published yesterday—talked about a self-defensive reaction, stepping back every time he starts to report a story.

Well, this kind of reflex action, this kind of concern, this kind of climate, in my judgment is inimical to a free press. There have been all kinds of statements from the administration which have tended to create a divisive situation, and therefore I feel that unless we decide precisely how it is drafted and unless we pass legislation I think the important news sources will dry up in the future. When that happens, the Government will be exactly where it was with a shield law—without the confidential information. The only difference is that without the shield law, not only the Government but the American people will also be deprived of important information which they have a constitutional right to know.

Thus to enact an all-encompassing shield law will cause no net loss of information to Government investigators and will insure continued publication to the American people of vital news stories. Not to enact such a law will eventually terminate further publication of these stories, with the only possible gain for the Government being avoidance of the embarrassment which such stories often cause it. The first amendment was not conceived to save the Government from embarrassment.

Where voluntary cooperation by the press is called for to prevent clear dangers or injustices to individuals, I am confident such cooperation will be forthcoming. After all, newsmen, like the rest of us, are human beings.

We should also be aware that if newsmen are added to the several hundred thousand doctors, lawyers, and clergymen who now possess testimonial privilege under our laws, the size of this relatively small group will increase by only about 12 percent.

In its opinion in the *Caldwell* case last year, the Supreme Court invited Congress to enact shield legislation, stating:

> Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or as broad as deemed necessary to address the evil discerned.

Justice Potter Stewart, in his dissenting opinion in the same case, criticized the Court for showing "a disturbing insensitivity to the critical role of an independent press in our society." Let the Congress not be equally insensitive.

I hope the Congress will treat this matter with urgency. Every encroachment on a free press besmirches our constitutional heritage. We have witnessed far too many such encroachments already. Let us act promptly and decisively to close this sad chapter of our recent history.

In the long run, I think the American Government will be less accountable to the people because legislative reporting will pass from the scene or strong editorials will pass from the scene or thoughtful commentary on radio and the TV will pass, because it is too sensitive or touches too deep an area. Against all of this will be a massive Government network seeking to check out facts, use grand juries in ways that are not intended perhaps, and I think we will have an inevitable climate of fear. I think we have seen that process now.

I have talked with all the major networks, and each of them has indicated to me that they believe in an absolute shield, that they are concerned about a qualified bill. Leave aside their concern on that point, their concern over what is happening is clear. I don't know of a senior officer of networks that I have talked to who did not express concern, I would say genuine and serious concern. I would think most of them have resisted this pressure and have continued to report the news fairly and accurately but none will deny they have this subtle concern in back of it, if it hasn't already eroded. All are concerned that it could.

I might add that we presently provide confidential protection, I think, to something like 900,000 doctors, lawyers, and clergymen, and if we add a proper right privilege to newsmen it will only increase that amount by roughly 12 percent, by way of illustrative figure.

The Supreme Court has clearly stated that Congress has freedom to determine whether statutory news privilege is necessary and desirable and to fashion standards and rules as narrow and broad as being necessary to address the evils concerned.

I have been interested in the development of Justice Potter Stewart's thinking, because initially he ruled on a case involving Marie Torre of the *Herald Tribune*. This case was not monumental in terms of importance of what she reported, but it became a principle. It had to do with whether Judy Garland's contract was going to be renewed or not and the *Tribune* reported that a vice president at CBS indicated for certain reasons it was not going to be. It had to do with allegedly the fact she had put on a little weight. Recognizing this was not the most important story in the world, I supported Marie Torre's refusal to reveal her source. She went to jail. I visited her there. Justice Potter Stewart ultimately wrote the decision. I subsequently was called by the administration and asked whether that opinion would in any way affect the *Herald Tribune's* judgment of Potter Stewart's nomination to the Supreme Court. I said of course not. But over the years I have had the chance to talk to Potter Stewart a little bit, partly because this was one of the first cases dealing with confidential source. I notice in the *Caldwell* case he wrote a most eloquent and thoughtful dissenting opinion. He wrote in a sense criticizing the Court for showing insensitivity to the critical role of the press in our society. Accordingly, I take his admonition at this point very seriously as we in turn took his decisions in the past, thoughtfully and seriously.

Let me again thank you for the privilege of testifying.

Senator ERVIN. Is it not true that every privilege that the law grants against testifying is based upon the conviction that it is better for the courts to lose the benefit of this particular evidence because a more important value of society is promoted by it?

Mr. REID. That would be my view.

Senator ERVIN. In other words, we have the physician-patient relationship to encourage people who suffer injuries or suffer diseases, particularly contagious diseases, to go to a doctor for treatment. The idea has been that it is better to suppress the testimony of the doctor than to discourage people from seeking medical assistance. Public health demands that.

Mr. REID. Exactly.

Senator ERVIN. And the husband-wife relationship, which has privilege against divulgence of communication between spouses, concludes that society is better off not having such testimony. The tranquility of the home outweighs the value of disclosing confidential communication.

Mr. REID. That is my view, and it is sometimes argued that you have to fully protect every right of law enforcement agencies. Well, in my judgment they have certain skills and capacities of their own and they don't need newsmen for them. Even if they did I would say the prior claim in the first amendment should take precedence in this kind of situation.

Senator ERVIN. If the lawyer-client relationship exists, then the lawyer is better able to secure to the client the fair trial guaranteed by the sixth amendment.

Mr. REID. Absolutely.

Senator ERVIN. I certainly agree with you in the observation that the first amendment was not written for the primary benefit of those who engage in the business of collecting and disseminating news. In the free enterprise system, we have to hold out an incentive for people to discharge an essential function. But the first amendment was written in order that all the people of the United States might know what is going on in this country and particularly the field of government.

Mr. REID. I think rightly so. In absence of free press there is no accountability except what a given administration chooses to make public, and far too often they appear before the public as an advocate rather than encouraging dissenting opinions.

Senator ERVIN. The abiding conviction is that our form of government, which our Constitution creates, would not function effectively if it were not for the first amendment and the free flow of information which it is designed to stimulate.

Mr. REID. I think we are right on the edge of losing this most precious right to the people and the climate that makes it operate. Unfortunately, I don't know a reporter today that is not concerned. That means that many may not go into the service of reporting to the public because they will feel that their rights are circumscribed. It is a rather sad commentary when you look at it in another way.

I have always believed this is a country where we give free reign and opportunity to every idea and let the merit or the facts of the story, when they reach the people, be judged fairly on their merits. We seem to have a Government today that treats the American people like children—there are certain things they shouldn't know about. That has been my experience and I guess I have seen it on two sides of the fence, as an editor and as an ambassador. Frankly, I think the American people are almost invariably ahead of the Government; their commonsense judgment is generally ahead and sometimes a good deal better. What I guess I was saying was that we should place our faith in the good judgment of all the people, and not blindly in the Government. The latter is not what I believe should be the concept of the United States.

Let me just add two personal notes. I have never had a confidence breached by a newspaperman, and I am talking about when I served as an officer in the Government, an executive. I don't basically know a responsible newspaper editor who wouldn't try to be thoughtful both as to human rights and to asking a reporter to testify if he witnessed a crime. Most reporters obviously would do that, and also would be thoughtful about not printing something that was contrary to the national security.

I once had such a case that involved—the facts were clear—had to do with a radar installation we had in Turkey that was monitoring flights of Soviet missiles in the Soviet Union, and the disclosure of that would have eliminated that intelligence. We readily agreed not to print it at that time.

I have seen nothing but thoughtful action by the press if they are met by two things: Responsible conversations from the Government and thoughtful suggestions and a conviction on their part that the Government is truly accountable to the people and wants all ideas to have a fair chance of judgment by the American people.

Senator ERVIN. I certainly agree with your observation that, regardless of whether the shield law is broad or narrow in scope, that it ought to be absolute. If we put in some vague and indefinite exceptions, the exceptions will destroy the rule.

Mr. REID. And invariably or inevitably, rather, it depends on the first amendment.

Senator ERVIN. Then I also favor a law being absolute, because we are supposed to have a government of laws rather than of men. If you defer to a judge's determination of what constitutes "overriding national interest," you run into problems. I don't know what it is myself; it can be defined any way.

Mr. REID. I don't know either.

Senator ERVIN. The law should be as simple as it can be.

Mr. REID. And as clear and absolute in the area it seeks to define. I couldn't agree more.

Senator ERVIN. Thank you very much for a most informative and stimulating statement.

Mr. REID. Thank you. It was a privilege to be with you again, Senator.

Mr. BASKIR. Our next witness this morning is Robert Dixon, Assistant Attorney General, Department of Justice.

Senator ERVIN. I want to welcome you to the committee and express our appreciation for your willingness to come and give us the benefit of your observations and views on this very important question.

STATEMENT OF ROBERT G. DIXON, ASSISTANT ATTORNEY GENERAL DEPARTMENT OF JUSTICE, ACCOMPANIED BY MS. MARY LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, AND MICHAEL BUXTON, ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL

Mr. DIXON. Thank you, Mr. Chairman.

I would like to introduce two of my colleagues here with me this morning.

On my right is Ms. Mary Lawton, Deputy Assistant Attorney General, and on my left is Mr. Michael Buxton, attorney adviser, both in the Office of Legal Counsel.

Mr. Chairman, I am pleased to have this opportunity to present to the subcommittee this morning the views of the Department of Justice concerning proposed legislation to establish a testimonial privilege for newsmen. At issue is the proper accommodation of the important interests of society in a vigorous and effective press zealously pursuing and publishing news, information, and opinion, and the equally important interests of society in the fair administration of justice. Success lies in producing a workable formula that encompasses, balances, and protects both of these interests.

The Department of Justice has always been sympathetic to the interests of the press in this area, including the interest in protecting confidential sources. We fully recognize the protections conferred on the press by the first amendment and judicial interpretations thereof. An energetic, dynamic, and diverse press has served our Nation well, fostering the vigorous debate of public issues that is the hallmark of a democracy. Unfortunately, there are occasions when interests of members of the press in protecting the secrecy of their information, like the interests of anyone else in business or personal secrets, conflict with the equally important public interest in obtaining information in order to get at the truth in judicial and legislative proceedings.

An analogous problem regarding public access to needed information arises under the fifth amendment's guarantee against compulsory self-incrimination, which grants a right of secrecy to any person who may be incriminated by what he says. Where the obstacle to the truth is a proper claim of this fifth amendment privilege, a grant of statutory immunity, upheld by the Supreme Court on various occasions, permits forced disclosure of the public needed information. In this sense not even the fifth amendment is an absolute bar to disclosure. The Supreme Court has never recognized a general first amendment privilege on the part of the press to refuse to divulge secret information or sources (*Branzburg* v. *Hayes*, 408 U.S. 665 (1972)). In seeking an absolute statutory privilege against the compulsion of information and sources in an area where a general constitutional right of secrecy is not recognized, the press is asking for a greater shield against disclosure of publicly needed information than our system of justice has accorded even to a person who properly pleads the privilege against compulsory self-incrimination.

The Department of Justice, as the chief law enforcement agency of the Federal Government, opposes the creation of a privilege for newsmen that would be absolute in character. We do this not merely because it seems conceptually inconsistent with the privilege against compulsory self-incrimination, but because we believe that an absolute privilege for newsmen in judicial or legislation proceedings would unduly subordinate the vital national interest in the fair and effective administration of justice.

The label of "newsman" should not serve as a shibboleth, allowing the reporter who witnesses a bank robbery or receives notice of a bombing to conceal vital information relevant to the commission of a crime.

Let us look at some examples of conflict between individual rights and newsmen's privilege.

Consider the plight of the judge faced with a situation where a newsman knowingly prints material in clear violation of express limitations on publicity ordered by the court to insure a fair trial. Here the issue of newsmen's privilege is intertwined with the issue of the proper restraints on publicity surrounding a criminal trial. There must be a balancing of the first amendment right of the press and the sixth amendment right of the accused to a fair trial.

In another context, consider the frustrations of a community unable to obtain corroboration of unverified charges in a newspaper alleging public corruption or graft. Or consider the even greater frustration of a community, convinced of the corruption, which is unable to obtain the testimony vital to conviction of the corrupt officeholders.

While the question of a testimonial privilege for newsmen frequently arises within the context of attempts by prosecutors to obtain information, we must also remember that such a privilege may have a great impact on the ability of a defendant to prepare his defense. The application of a newsmen's privilege statute in this context may indeed violate the command of the sixth amendment that a criminal defendant is entitled to compulsory process in his own behalf, part of the right of confrontation.

The inappropriateness, even danger, of creating an absolute right of secrecy for newsmen takes on added force when placed in juxtaposition with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The doctrine of that case, and subsequent extensions of it, goes a long way toward removing press accountability for libelous statements concerning public officials generally. Imagine the situation of an aggrieved public official—Senator, Congressman, Governor, or other—who is egregiously libeled by the press, thus virtually destroying his public career. In a resultant libel suit against the offending members of the press the aggrieved public official may attempt to recover—under the severe constraints of the *New York Times* doctrine—if he can prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80. If the notes of the offending journalist and fellow journalists were shielded by an absolute privilege law (or even by a qualified privilege giving full press secrecy regarding civil actions), how could the aggrieved public official obtain the evidence needed to subject the press even to the limited accountability of a libel suit?

In the view of Mr. Justice Fortas, dissenting in *St. Amant* v. *Thompson*, 390 U.S. 731, 734 (1968), the *New York Times* doctrine, even without the added force of a shield law, had been extended to the point of making the first amendment a "shelter for the character assassinator." He expostulated that the "occupation of public officeholder does not forfeit one's membership in the human race." Plenary power, that is, power without accountability, is always dangerous, whether it be of the Government, of big business, of big labor, or of the press.

Recognizing, however, that compulsory process in some circumstances may have an inhibiting effect on the ability of a newsman to gether news, the Department of Justice does not oppose, in principle, the search for a viable formula for a qualified newsmen's privilege. We share the concern of those who engage in that endeavor. The Department, however, believes that the successful experience under the Attorney General's "Guidelines for Subpoenas to the News Media" which are attached, demonstrates that legislation governing Federal proceedings is unnecessary at this time.

The guidelines are a clear statement of the Department's policy of negotiation, mediation, and restraint in the area of subpenas to the press.

Under the guidelines, the Attorney General will not authorize a request for a subpena unless (1) the information sought is essential to a successful investigation of a serious crime, (2) the information is unavailable from non-press sources, and (3) the subpena is limited and reasonable in time and scope, especially when unpublished or confidential information is sought and first amendment rights are at stake.

In the *Branzburg* case, Mr. Justice White, speaking for the Court, referred to the Department's guidelines as a seemingly satisfactory solution to the problem:

"The rules are a major step in the direction petitioners desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and Federal officials." 408 U.S. at 707. This indeed has been the case. It has been our experience since the guidelines were announced in August 1970, that the vast majority of situations of potential conflict between the Department and the press have been satisfactorily resolved by negotiation.

Since August 1970, the Department has requested the issuance of subpenas to newsmen in only 13 situations. In 11 of the 13 instances, the newsmen agreed to testify or to produce documents but preferred the formal issuance of a subpena. In only two situations not involving a negotiated agreement did the Attorney General, on request, approve issuance of subpenas. The Department has denied seven requests for issuance of subpenas against newsmen because of noncompliance with the guidelines.

To the best of our knowledge, no abuses have occurred regarding subpenas authorized under the guidelines. Do not the interests of law enforcement predominate over the interests of the press when Government seeks a newsman's photo of an alleged incident of police brutality or a letter sent to a newspaper by a person who claims to be responsible for the bombing of a Federal building? In neither of these situations is a confidential source involved nor is the free flow of information to the public impeded in any way. In 2 of the 13 situations in which subpenas have been requested by the Department against newsmen was a confidential source involved, and in both of these situations the information was supplied on the basis of an agreement with the newsman. I have with me today a detailed statement summarizing the experience under the guidelines, which I will offer for inclusion in the record of this hearing at this point.

We believe that the guidelines have successfully operated at the prosecutorial level to alleviate any friction between the press and the Federal Government and that they encompass, balance, and protect the interests in both a free press and the fair administration of justice.

It should also be remembered that the newsmen is accorded judicial protection under exitsing law. A U.S. district court can issue an appropriate protective order on a motion to quash a subpena if a grand jury investigation is not being conducted in good faith or if it improperly interferes with first amendment rights. As Mr. Justice Powell, concurring in the *Branzburg* case, said:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.
>
> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." 408 U.S. at 710.

We also cannot ignore the effect of a newsmen's privilege in the context of civil litigation. Here again the courts are capable of protecting the interests of the press. In *Baker* v. *F & F Investment*, 41 U.S.L.W. 2347 (2d Cir. Dec. 7, 1972), for example, the second circuit last December held that in a civil case, absent an overriding an compelling need for disclosure, the preferred freedom of the first amendment and the closely related interest of the public in nondisclosure of a journalist's confidential sources outweigh the public and private interest in compelled testimony. That holding was made. I might add, in a case which the part seeking information were black plaintiffs in a claim of blockbusting in Chicago against realtors. In this instance the court, let's say, balanced the civil liberties' interest under the first amendment, and under the particular facts there, against the equally important civil rights interest, and the latter was forced to yield in a suit for a ruling against discrimination.

In summary, we oppose an absolute privilege because it would not even attempt to balance the competing and legitimate interest in open disclosure, so vital to the public, the government, the criminal defendant, and others, against the blanket claim of total press secrecy. We also believe that qualified privilege legislation is unnecessary and perhaps unwise at this time for several reasons.

First, the Department of Justice guidelines and the protective measures available in the Federal courts appear to be sufficient to protect the legitimate interests of the press. Second, the definition and scope of a qualified privilege has not yet been satisfactorily resolved and presents difficult problems of inclusion and exclusion that may give rise to litigation and problems of judicial administration. Third, it is doubtful whether a statute providing a qualified privilege would have any additional effect, not already accomplished by the guidelines, in insuring the free flow of confidential information to the press.

In summary, we oppose an absolute privilege because it would not even attempt to balance the competing and legitimate interest in open disclosure, so vital to the public, the government, the criminal defendant, and others, against the blanket claim of total press secrecy. We also

believe that qualified privilege legislation is unnecessary and perhaps unwise at this time for several reasons:

First, the Department of Justice guidelines and the protective measures available in the Federal courts appear to be sufficient to protect the legitimate interests of the press. Second, the definition and scope of a qualified privilege has not yet been satisfactorily resolved and presents difficult problems of inclusion and exclusion that may give rise to litigation and problems of judicial administration. Third, it is doubtful whether a statute providing a qualified privilege would have any additional effect, not already accomplished by the guidelines, in insuring the free flow of confidential information to the press.

The President, in a letter of November 4, 1972, to Mr. Robert Fichenberg, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, said that he would reconsider his position on the need for Federal legislation "[s]hould it ever become apparent that the Federal guidelines fail to maintain a proper balance between the newsmen's privileges and his responsibilities of citizenship . . ." Such legislation should be adopted, we feel, only after the necessity for it becomes apparent.

The Department of Justice would in any event continue to oppose Federal legislation that would create a testimonial privilege for newsmen which would be binding on State proceedings. As a matter of policy, it would be unwise for Congress to hamstring the states in the operation of their own judicial, administrative, and legislative proceedings—an area that has traditionally and properly been left to their control. While I would urge every state attorney general to establish policies and procedures for his state similar to the guidelines of the Department of Justice, I do not think such requirements should be mandated by a Federal statute.

I realize that it is tempting to impose a uniform standard. But we must not forget that we have chosen a federal system. Respect for federalism requires respect for state policy in balancing the interests of the administration of justice and of the press, and requires a tolerance of procedural diversity. Virtue of experimentation is particularly compelling here where changes are sought in a complex area which involves a number of ancillary societal issues and difficult problems of definition. If a state errs in its judgment, the danger that results is confined. If Congress errs, and its standards are exclusive, the danger will pervade the entire Nation.

It should be remembered that newsmen's privilege is essentially a question of evidentiary procedure. To our knowledge, Congress has never attempted to legislate general rules of civil or criminal procedure, or general rules of evidence, for the states, nor has it attempted to impose Federal administrative procedure on State government. Such matters have traditionally and properly been left to the individual state. It is true that in order to make congressional witnesses more cooperative Congress may immunize them against state prosecution, but that is simply a conventional use of traditional Federal supremacy principle to protect legitimate Federal interests—*Adams* v. *Maryland*, 347 U.S. 179 (1954).

Legislation imposing a testimonal privilege on the states is likely to pose problems of comity between Federal and state courts and to strain their delicate interrelationship. Questions are bound to arise concerning the role of the Federal courts in supervising the administration and enforcement of a Federal privilege law by the states. Do proceedings in state courts involving newsmen's privilege raise a question of a federally protected "civil right" that warrants removal to a Federal court? Can a Federal court enjoin a state judicial or legislative proceeding involving newsmen's privilege, or can a Federal court quash a state subpena? If the protection of a newsmen's privilege is premised on a constitutional right as defined by Congress, is a state judge or legislator civilly liable under 42 U.S.C. 1983 for deprivation of a right under color of law when he issues a subpena to a newsman? Such questions are inevitably raised by legislation in this area.

As a matter of constitutional law, Federal legislation to create a newsmen's privilege applicable to state courts and proceedings would stretch the powers of Congress under article I of the Constitution to, if not beyond, their limits. I assume that one constitutional basis on which such legislation might be premised is the commerce clause (art. I, sec. 8, cl. 3). The news media, it could be argued, are instrumentalities of interstate commerce; Congress can prevent states from imposing unreasonable burdens on the instrumentalities of commerce; state subpenas of newsmen are an unreasonable burden; and therefore Congress can regulate state subpenas of newsmen. On close examination, however, we think this reasoning is of questionable reliability.

Before Congress, on the basis of the commerce clause, can restrict the tenth-amendment-protected subpena power of State courts and legislatures, it must make some determination that the subpena is such a grave burden on interstate commerce as to necessitate the restriction on the States. The coverage of the commerce clause as it relates to the ability of Congress to legislate has been traditionally interpreted by the Supreme Court in the area of the ability of the Congress to regulate the business activities of the press. The Court has reached the conclusion that the news business is in interstate commerce for the purposes of being held subject to certain types of Federal regulation of general business; for example, the National Labor Relations Act and the antitrust laws. *Associated Press* v. *National Labor Relations Board*, supra. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1 (1945). In the area of newsmen's privilege, Congress would be attempting to regulate the very functioning of State government in the name of protecting the interstate aspects of the media. Presumably this necessitates a finding that the functioning of State courts and legislatures unduly restricts the ability of the media to gather news on an interstate basis, by virtue of State-issued subpenas. But as the Court noted in *Branzburg*:

> [t]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. 408 U.S. at 693.

If Federal legislation premised on the commerce clause is open to question, it might be argued that such legislation could be premised on section 5 of the 14th amendment as implementing the due process clause of that amendment. While *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966), suggests that the power of Congress to implement the equal protection clause of the 14th amendment is very broad, in the later case, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), indicates that it is not unlimited.

To assert that Congress has the power to legislate a newsman's privilege binding on the States under section 5 as an implementation of the due process clause is to set the stage "to strip the States of their power * * * to govern themselves," to use the words of Mr. Justice Black in that case, 400 U.S. at 127. The guarantee of life, liberty, and property due process clause, encompasses the entire field of human activity and thus of potential legislative action. Any rule of evidence could be determined by Congress to impinge on that guarantee. Accordingly, under this theory, there would exist a basis for congressional action to enact legislation superseding every State rule of evidence. Certainly section 5 should not be read to confer such power on Congress for such a reading would contravene the principle of federalism, the viability of which the Constitution was consciously meant to maintain. That *Katzenbach* v. *Morgan* may have been the high water mark of an expansive interpretation of congressional powers of section 5 has been recognized by Mr. Justice Stewart, joined by the Chief Justice and Mr. Justice Blackman: "That case, as I now read it, gave congressional power under section 5 the furthest possible legitimate reach." *Oregon* v. *Mitchell*, 400 U.S. 112, 296 (1970) (separate opinion).

The Department of Justice recognizes the legitimate interests of the press in gathering news and protecting confidential sources. We understand the concern of those who are proposing legislation to create a qualified testimonial privilege, but we are also mindful of the difficulties in drafting and administering such legislation. We believe that the successful experience under the Department's "Guidelines for Subpenas to the News Media" demonstrates that such legislation is unnecessary at this time. The Department, therefore, opposes the enactment of an absolute privilege bill; that is, an absolute press secrecy bill, because it would sacrifice in every instance the search for truth in judicial and legislative proceedings to the interest of the press. For the reasons just discussed, we also oppose any Federal legislation that would create a newsman's privilege applicable to State proceedings. I can assure you that the Department will continue its policy of restraint and negotiation in the area of subpenas to newsmen. A request for a subpena will be authorized by the Department only in those instances where the conditions of the guidelines are met and where the information is essential to the successful investigation and prosecution of a serious Federal crime. I am confident that an accommodation of the sometimes conflicting interests of a free and effective press on the one hand and on the other the fair and effective administration of justice can be achieved by pledging ourselves to an atmosphere of negotiation and restraint, in order that the basic values of a free press and a free society may be served.

We thank you, Mr. Chairman.

Senator Ervin. I would assure you I would not invoke *Katzenbach* or *Michell* v. *Oregon* to sustain any proposition. I think both of them have conclusions which are not warranted by the Constitution. Despite my respect for the Supreme Court, I think both of those decisions are absurd.

I am glad it has been held that the fact that the lawyer disagrees with the Court, is not evidence that the lawyer lacks testimonial capacity.

Does not any testimonial privilege impede the search for truth?

Mr. DIXON. Yes, it is a detriment in the search for truth.

Senator ERVIN. The sixth amendment which gives us the right to obtain the attendance of witnesses and the right to be confronted by his accuser does not prevent either Congress or the States from establishing privileges, does it?

Mr. DIXON. If I understand the question correctly, we have the sixth amendment, and the sixth amendment guarantees access by a defendant to information.

Senator ERVIN. But it doesn't prevent Congress or the States from establishing privileges against disclosure of testimony in certain circumstances?

Mr. DIXON. The phrase "certain circumstances" is one I would agree with.

Senator ERVIN. For example, don't the courts hold that the rights given to an accused by the sixth amendment does not invalidate a state law, which establishes the lawyer-client relationship?

Mr. DIXON. That is my understanding, but the client may waive the privilege; hence it is not absolute.

Senator ERVIN. And, also, it does not invalidate a state law which recognizes the confidentiality of communication between husband and wife.

Mr. DIXON. My understanding is that there are some exceptions to that privilege. It is not an absolute but it is a strong privilege where the communication at issue was given in confidence. Newsmen seek a right of silence even when there is no confidential communication.

Senator ERVIN. And, also, the physician-patient privilege is not invalidated by the sixth amendment.

Mr. DIXON. There, again, my understanding is that physicians may be required, despite the privilege, to report gunshot wounds, report knowledge of disease that is communicable. Again, it is a strong privilege but not absolute.

Senator ERVIN. That is because the law of the state doesn't make it absolute, not because the sixth amendment makes it less absolute.

Mr. DIXON. Well, we always have to put the constitutional phrases and clauses in the context of the courts' construction, and there are very few constitutional clauses that are absolutes in all instances.

Senator ERVIN. Now, according to the recent statement of the White House, the sixth amendment doesn't invalidate what the White House calls "Executive Privilege"; does it?

Mr. DIXON. There we bring in the separation of powers and balance the matter out. The precise issue has not arisen.

Senator ERVIN. Well, the thing is, legislative bodies have the right to establish rules of evidence; don't they?

Mr. DIXON. That is certainly true, within constitutional limits.

Senator ERVIN. One of the fundamental rules of evidence is that hearsay evidence is ordinarily not admissible in court.

Mr. DIXON. Pardon me?

Senator ERVIN. I say one of the fundamental rules of evidence is that a witness must be able to depose to matters within his personal knowledge and he cannot be permitted to tell what rests upon the authority of another what was hearsay?

Mr. **Dixon**. That is correct for courts. Grand jury rules are more flexible.

Senator **Ervin**. Well, the truth of it is almost everything that a newsman knows, as a general rule, is hearsay; isn't it?

Mr. **Dixon**. Some could be hearsay, some could be eye witness evidence or direct conversations.

Senator **Ervin**. Is it fair to grab a newsman out gathering news who sees a crime committed?

Mr. **Dixon**. Indeed, we could say that is an example of the courts' authority, outside the hearsay concepts to preserve their own powers to get at the truth.

Senator **Ervin**. I think where the greatest complaint of newsmen comes in is the fact they are so often subpenaed before grand juries with little or no justification. The newsmen are opposed to these as being "fishing expeditions."

Mr. **Dixon**. That does happen, but courts can control grand juries.

Senator **Ervin**. The fact is, that a grand jury was originally supposed to be a judicial body that stood between the citizen and the government, and passed on the question of whether it was a proper case to be heard by a court. Now the grand jury has been converted to the prosecutorial arm of the government in some cases.

Mr. **Dixon**. It has some investigatory powers in its own right as far as public officials are concerned.

Senator **Ervin**. I agree with you that no person should be excused from testifying to a crime which is committed in his presence. I have a bill which expressly states *that* to be the obligation of a newsman, just like everybody else. My bill is a very narrow bill and it is an absolute bill. It says that a newsman shall not be compelled to disclose the identity of any person from whom he receives information if he has given the informant a contemporaneous assurance that he will not disclose his identity.

What is the objection to that, since it is followed by a provision that it shall not excuse a newsman from testifying to the identity of any person who commits a crime in his presence?

Mr. **Dixon**. I do not believe we have strong objection to that portion of your bill. Indeed it seems to be in accord with, on that point, the *Branzburg* case itself. There a reporter was involved in a situation of being an eyewitness to mixing drugs and changing drugs from one form to another and a sense in its own right.

Senator **Ervin**. I have no quarrel with the holding in the *Branzburg* case, where the reporter was required to testify because he actually saw people committing a crime. I don't think there is any more excuse for excusing a newsman from testifying to a crime than it is to excuse you or myself or anybody else.

Mr. **Dixon**. I would agree with that, sir.

Senator **Ervin**. The fact that the people who committed the crime invited the reporter to come as a witness to the crime, ought not to hamper their prosecution. However, it might entitle them to a verdict of not guilty on the grounds of mental insanity.

Now, the only other privilege that I have set out in my bill is that a newsman or any person having the custody or control of unpublished information, shall not be compelled to disclose it. I define unpublished information to be any note or memorandum or picture or negative or tape or recording or other record made by the newsman while he is engaged in his occupation and which has never been published by any means of communication. I think that it is important to protect a newsman there because the district attorneys and any congressional committee are frequently inclined to issue subpenas requiring newsmen to produce a whole lot of unpublished information of that nature.

Mr. DIXON. Well, on that point, Mr. Chairman, their views seem to be very close to one part of our guidelines where the guidelines say great caution is to be exercised in requesting subpena authorization by the Attorney General. We oppose the absolute concept, but we are sensitive to the fundamental privilege.

Senator ERVIN. If a right is not absolute, it is nonexistent, really, in my judgment.

Mr. DIXON. Well, that is a very appealing statement. All I can say as to that is that the definition of a right is crucial at the outset, and one thing defined a certain way once becomes conclusive. We do not think we should create an absolute newsmen's privilege, on across-the-board basis. I recall along that line, an article in the *Utah Law Review* by Dean Griswold, a speech he gave at the Utah Law School dedication back in 1962, as I recall, which the title was, "Absolute in the Dark." We had a certain warning in that article regarding what he felt was an unqualified overly broad expansion of some constitutional clauses by the courts.

The question, I think, is one of definition. Most of us agree on something precise that can be conclusive, and perhaps we can state it is an absolute. For example, in the area of the fifth amendment, the person properly pleads the fifth amendment, and if there is no immunity statute available, then it is absolute. But the fifth, per se, does not confer an absolute right of silence.

Senator ERVIN. Well, of course, the immunity statute says that, in effect, when a man testifies in obedience to the immunity statute, he doesn't incriminate himself because he can't be prosecuted for the crime that he confesses.

Mr. DIXON. The statute must be broad regarding incrimination, and then testimony can be compelled.

Senator ERVIN. Of course, the immunity statute eliminates the very reason why the self-incrimination clause was established, as I see it.

I am not absolute, generally speaking, but I think if you give a man a right or privilege, you better make it absolute or it will be whittled away. I can't see how the lawyer-client privilege would be of value if it could be whittled away.

Now, a few weeks ago, I would have endorsed everything you said about the lack of wisdom in legislating for the state. There is, in the petition you cite there, *Adams* v. *Maryland*, it says no court shall inquire as to what the witness testified before a congressional committee. That was the general law and the Court held it was valid in the *Adams* case. The State of Maryland couldn't use the statements that the witness had made before the congressional committee.

I have a little trouble with the guidelines because the guidelines of the Attorney General are not binding on anybody or anything except the people who are subject to his office that is, the U.S. attorneys. Isn't that true?

Mr. Dixon. They do apply to all Department of Justice subpena matters either as plaintiff or defendant, and civil or criminal, too.

Senator Ervin. But they don't apply to the state courts or civil actions?

Mr. Dixon. They would apply to a civil action inside the Department of Justice like a civil antitrust suit.

Senator Ervin. But not civil actions brought by third persons or citizens, generally?

Mr. Dixon. No.

Senator Ervin. Of course, they are not binding on the states.

Now, didn't the Supreme Court hold in the *Associated Press* case that the Associated Press, which was engaged in sending information across state lines, was engaged in interstate commerce, and in refusing to service certain press associations that the Associated Press was violating the antitrust laws which are based solely upon the Interstate Commerce Clause?

Mr. Dixon. Yes.

Senator Ervin. So the Interstate Commerce Clause gives Congress the power to regulate the removement of persons and goods and communications from across state lines, doesn't it?

Mr. Dixon. Yes, it certainly does.

Senator Ervin. And it can undoubtedly. The communication of news and ideas by the media of the press across state lines is one of the biggest interstate businesses in this country, isn't it?

Mr. Dixon. It certainly is and probably attracts more attention from the public than most businesses do.

Senator Ervin. So it seems to me, that if Congress finds that if jailing newspapermen for not divulging their unpublished information or confidential sources of information, impedes interstate commerce and that also it interferes with the right of the people to know, than it could legislate with regard to the states.

Mr. Dixon. The powers under the Commerce Clause must always be balanced against the fact that we have a federal system and the reserved laws of the States. We must consider the impact of any use of the commerce power on the legislative power in the states. We really have two ways ways to limit the commerce power logically. One is to say that the Commerce Clause doesn't logically reach the activity being regulated. We think that is relevant here. There have been regulations of the general business of the press, but we do feel that newsmen's privilege is something other than general business, other than wage and hours, labor legislation, and so on. And look at the fact that what is really happening—directing our attention to the impact on the legal process of the states to subpena in order to obtain their own governmental goals is a regulation of the states, not the press.

Senator Ervin. We did that in the *Maryland* case directly.

Mr. Dixon. Regarding *Adams* v. *Maryland*, that Federal statute was designed to protect a particularized Federal interest in making congressional investigations effective by extracting witness information. We think that case rests on an express principle of Federal supremacy to protect Federal needs, that is, needed Federal testimony.

We don't think there is any similar Federal interest here needing protection against states or requiring a state newsmen's privilege.

Senator ERVIN. They upheld that on the grounds that they didn't know what the man could tell the congressional committee.

Mr. DIXON. In support of a Federal function, correct.

Senator ERVIN. If the Congress has the power to adopt the law that is binding on the state courts in order to prevent prosecution in state courts for testimony given before congressional committee—why hasn't Congress the power to draft a law to allow all of the people, including the Members of Congress, to know what is going on? I can't see the distinction. It seems to me there is more congressional power to enact a law for everybody in the country to hear what is happening than it is to permit the members of a congressional committee to hear information relating to a limited set of circumstances.

Mr. DIXON. Well, the basic distinction that I tried to make, and I think it can be made as a proper distinction, is that there was an explicit Federal function of congressional investigation in jeopardy absent the immunity statute. So to make fully effective this particular Federal function the immunity statute was designed to remove all fear from witnesses of harm in the future if they testified.

On the other hand, the newsman's privilege bills are not based on an identifiable, direct Federal function, such as the investigatory function, or the taxing function. They would seek to subject an area traditionally reserved for the states, evidence matters in their own state courts to Federal regulation.

Senator ERVIN. But it would seem to me, that the power of Congress to regulate interstate commerce, which involved the movement of news across state lines, is a lot more powerful a consideration than denying the state court the right to hear what is said in a congressional committee. In other words, I have difficulty seeing the distinction you are making.

But we can go on.

Mr. DIXON. I have reservations about the power of Congress to regulate state evidence rules, or in general to change by legislation the areas of general freedom in the Bill of Rights which are largely left to court interpretation and court protection up to this point.

Senator ERVIN. Well, I am a strong believer in state's rights, probably one of the strongest in Congress. The federal system of government gives certain powers to the national system of government. One of those is the power to regulate interstate commerce and another, since the first amendment has been extended to the states, is to preserve the rights it guarantees. It has the power to regulate what is injurious to the interests promoted by the first amendment because of the necessary and proper clause of the first article to the Constitution.

Mr. DIXON. A few cases have held in recent years that congressional regulations under the commerce clause are invalid. I can't think of one—unless we go way back to almost the thirties.

On the other hand, there was perhaps a little word of warning in a special comment by Justice Stewart in The Federal Loan Shark case, *Perez v. United States* in 1971, in which he sort of threw up his hands and said the Commerce Clause is very broad but shouldn't be unlimited. He felt the Federal Loan Shark Act did deeply involve state matters with such an ephemeral Federal connection that he was worried. We raised that point earlier this morning.

Senator ERVIN. I have to concede, I have argued for narrow construction of the clause. But I believe the Federal power to regulate interstate commerce is complete, absolutely complete, no exceptions.

Mr. DIXON. I think we can all agree on that, but the problem of defining interstate commerce.

Senator ERVIN. The National Labor Relations Act provides for machinery to settle industrial disputes, doesn't it?

Mr. DIXON. Correct.

Senator ERVIN. And it is based, in part, upon the theory that industrial disputes prevent the flow of goods in interstate commerce or minimize goods of interstate commerce and the Court has upheld these labor laws on that ground. Anything which prevents the flow of goods in interstate commerce is subject to regulations on the Commerce Clause.

Mr. DIXON. That is true. But in those instances there is no countervailing interest, as would be the case in the newsman's privilege area, of possibly impeding prosecution of a crime; or as in some of the bills of making it difficult or impossible to maintain a libel suit. When we say there is a strong commerce power that is true, to be sure. But there is an adverse fallout in terms of public enforcement of the criminal laws, especially if we push the Commerce Clause too far in this instance in support of newspaper shield laws.

We would also like to suggest that the States are the primary agencies of law enforcement, not the Federal Government for the general range of crimes and, therefore, we have a real concern about moving to rapidly into the field of passing shield legislation, which legislation might impede state enforcement of general state criminal law.

Senator ERVIN. Well, any act of Congress which might impede the states is nevertheless the supreme law of the land. If Congress is within its authority to legislate under the Interstate Commerce Clause or under the first amendment, it seems to me state judges must obey.

Mr. DIXON. The Commerce Clause power, as I said, is certainly very broad, even considering Justice Stewart's caveat in the *Perez* case about 2 years ago.

Senator ERVIN. And the power of the Federal Government is pretty powerful, too, if they can justify the rulings like *Sullivan* v. the *New York Times*.

Mr. DIXON. We are concerned about the impact of broad privilege legislation on the libel problem as I mentioned in my testimony.

Senator ERVIN. Personally, I had the same opinion you had on this subject, but I have been converted. I don't have the least doubt that Congress can enact this law. My bill has a declaration to the effect that it is necessary. I don't like Congressional declarations too much, but I remember the courts upheld the Voting Rights Act in 1965 on the congressional declaration that the election officials of my State had violated the law, and the 15th amendment. I thought that it was a bill of attainder, but the Court protected Federal officials but didn't protect state officials. It held that they had no right to due process of law under the provision. I didn't accept it. If you pass laws in the Congress that abolish the states' laws without giving them any notice, you are denying them due process.

Mr. **Dixon**. That is a fair statement of part of our concern about extending any newsmen's privilege bill to the states because it would create great power in the Federal Government to regulate decisions in state courts.

Senator **Ervin**. I don't see why we need discuss this any more, because I have given my views and you have given yours. I cannot see, if Congress can legislate in respect to acts occurring wholly within the borders of a state, on the grounds that those acts will decrease the flow of goods in interstate commerce, then it seems to me they have the same authority to legislate with respect to increasing the flow of information in interstate commerce.

Our Counsel has questions.

Mr. **Baskir**. Professor, what is the formal status of the guidelines right now?

Mr. **Dixon**. They are in force, have been in force since September 1970, and are being administered vigorously according to their terms. We have submitted for the committee, for the record, a formal statement on the experience under the guidelines, a memorandum dated March 1. We review not only the history of the guidelines in some detail, broken down by particular decisions inside the Department of Justice and the subpena request and the dispositions of the requests, but also at the end of this statement, we make some comments about other subpenas which the public may think are justice subpenas, but are not. The last few pages mention subpenas that are outside the guidelines because in state courts, or because they are civil matters, or because they are not a newman's matter, such as the case of Mr. Popkin, an assistant professor at Harvard, and so on.

I have with me a person who has been with the Department of Justice longer than I have. This is, I think, my eighth or ninth day on the job, and with your permission, I suggest you might want to receive a response from Deputy Assistant Attorney General Mary Lawton on these questions.

Mr. **Baskir**. I was interested in whether they were issued as formal procedures under the Administrative Procedures Act or as a policy statement issued by the Attorney General. Were they issued under the Administrative Procedures Act?

Ms. **Lawton**. No, policy statements——

Mr. **Baskir**. There were no hearings as the APA would require before they were issued, no decisions, no announcements of the hearings?

Ms. **Lawton**. No, they are not agency rulemaking, they are internal policy guidelines.

Mr. **Baskir**. Is there any intention of issuing any pursuant to the APA regulations?

Ms. **Lawton**. Not that I know of.

Mr. **Baskir**. Do you have any objection to doing that?

Mr. **Dixon**. I will consider the matter—I am not quite on top enough to have a final answer on that.

Mr. **Baskir**. Were they issued in the Federal Register?

Ms. **Lawton**. It is my recollection they were, but I will have to doublecheck for you.

Mr. **Baskir**. It would seem to me if they were issued formally under the APA as formal rulemaking, then there would be a little more assurance to the public and press that the next Attorney General would, when he decided that maybe he felt differently from his predecessor, issue a different kind of policy statement. Under the APA, there would be at least the assurance they were formal rulemaking and they would have to go through formal rulemaking procedures to after that.

Mr. **Dixon.** We feel there has been no change in the strong policy of following the guidelines very carefully.

Mr. **Baskir.** Peoples' minds change and it seems to me it would be better in terms of their solidity to rely upon the formal rulemaking than the Attorney General.

Senator **Ervin.** That raises a serious question as to whether the Attorney General has the power to legislate.

Mr. **Dixon.** We appreciate that question, Mr. Chairman. We do see problems of putting everything that is of a policy nature, even a very important policy nature, inside the Department into the Federal Register. If it is a departmental matter, it should be handled as a departmental matter.

Senator **Ervin.** Wouldn't it be better, if you are going to have the guidelines, to have them adopted by Congress as a law?

Mr. **Dixon.** Adopted by Congress?

Senator **Ervin.** Yes.

Mr. **Dixon.** We feel that would raise additional problems. We moved forward on this problem back in 1970. We feel we have had a good experience with the guidelines. At the present time, we don't feel there is any need for further concern except to follow their terms. As we note it in our testimony, only 13 subpenas have been approved under these guidelines which were issued in mid-1970. Eleven of the subpenas were in situations——

Senator **Ervin.** Of course these are binding on the people who have to take orders from the Department of Justice. But in other situations, such as the case growing out of the Watergate affair in these actions and cross actions between Republicans and Democrats, the guidelines don't apply there at all?

Mr. **Dixon.** No, they do not apply to such nondepartmental civil suits. The judge hasn't ruled on that private civil suit yet, and it is before Judge Richey, as I understand it.

Mr. **Baskir.** You stated the Department has no intention of changing guidelines. Of course, should a new Attorney General come in, you can't guarantee they will never be changed. Assuming you have no present intention of changing the guidelines, why not put them in the legislation if they work well. They do follow the Ninth Circuit Court and the Stewart dissent in terms of their approach and do parallel certain bills before Congress. It would seem to me that even governing the Federal prosecution—leaving aside the other possible avenues for subpenas—it would be better to put them into legislation so that everybody knows that the Congress and the President, as well as the Attorney General, through the formal legislative process, means what they say about the standards in these guidelines.

Mr. **Dixon.** They are distributed here through our testimony.

Regarding the question of inserting them in the Federal Register, I would want to give a little more thought to that.

Mr. **Baskir.** I am thinking about legislating those guidelines—formal legislation.

Mr. Dixon. Congress is free to give consideration to this.

Mr. Baskir. What is the Department's position? Does the Department oppose legislative guidelines?

Mr. Dixon. I don't believe we have a position on that at the present time. Legislation is an action which has a congealing effect which could cut both ways. I think it would be difficult to strengthen the guidelines in light of our experience or to change them productively in some other way.

Mr. Baskir. You are satisfied with the guidelines and you don't have any intention of changing them, but one disadvantage, from what you were saying, is that legislatively it would make it less convenient to change them.

Mr. Dixon. It could be a problem.

Do you have a response on that, Ms. Lawton?

Ms. Lawton. No, beyond the fact these were written at a particular point in history with particular problems we knew about. There may be new forms of media developed in the future that we know nothing about that could be changed. These are not, of course, in statutory language, as you realize. A good statutory draftsman wouldn't accept the guidelines. They are written in a different form.

Mr. Baskir. The one difference between these guidelines and the Ninth Circuit in the *Caldwell* case—one of the important ones—is that the Ninth Circuit leaves it to a magistrate to determine the balance between the need for disclosure and the need for protection. In the case of the guidelines, it is the Attorney General who makes the decision whether or not to protect inside sources. Under the guidelines, it appears that the Attorney General, who is executive officer, and chief prosecutor, among his other functions, is making this balance. Wouldn't it be better to have it made by one——

Ms. Lawton. Well, it ultimately is. The Attorney General only decides to seek the subpena, but the judge decides, on a motion to quash, whether that subpena will stand. This is only the initial act by the Attorney General.

Mr. Baskir. The standards in the guidelines, of course, involve considerations that the Court in the *Branzburg* case says are not required, and, absent legislation of those same standards, are the only standards on the motion to quash. So the guidelines do add something and do present something that a magistrate doesn't consider. It is the Attorney General, chief prosecuting officer, who is balancing the first amendment against the interest of the prosecution, not a neutral magistrate.

Ms. Lawton. As Justice Powell said, the courts are still open to protect the rights of the newsmen and the fact that we seek a subpena initially does not mean it is going to stand, and the newsman is going to be compelled.

Mr. Dixon. My understanding is that the field of subpenas has not been challenged.

Mr. Baskir. Of course, it could be challenged under the *Branzburg* case.

Ms. Lawton. In a civil case, no, *Branzburg* wouldn't govern.

Mr. Dixon. In the *Baker* case, which I cite in my testimony, despite the narrow view of *Branzburg*, the Second Circuit did quash the subpena in that Chicago-based block busting suit.

Senator ERVIN. I am a little uncertain about what Justice Powell meant. When you take the majority opinion in that case, in which he concurred, it said, newsmen have no privilege under the first amendment to withhold information. So the rights they can assert under that, seem to be nonexistent.

Ms. LAWTON. I think what the Court was really saying is that there is no special privilege under the first but you still have under the Federal rules, both criminal and civil, limitations on discovery. Onerous subpenas, or "fishing expeditions", can be quashed on that ground alone.

Senator ERVIN. That can be applied to any citizen, but I take hope, as Justice Powell indicated, this might not be the final word on the subject.

In my own opinion, it would have been much better if the Court had followed the very enlightened opinion in the *Caldwell* case of the Ninth Circuit Court of Appeals, which balanced the interest. Society has two great interests: one is the interest in enforcement of the laws and the other is the interest in knowing what is going on in this country of ours. I would think the Court could balance that much better on a case-by-case method that we Congressmen can do in the rigidity of a statute.

Thank you all very much.

Mr. DIXON. Thank you, Mr. Chairman.

We appreciate being here and I give my thanks on behalf of my colleagues here who also enjoyed being present.

Senator ERVIN. Thank you. I think we have had an interesting discussion. I don't want to get entirely out of the habit of arguing with other lawyers, because my constituents might make it necessary for me to resume that occupation.

Thank you very much.

Mr. BASKIR. Our next witness this morning is Norman A. Cherniss, Executive Editor of the *Riverside Press and Daily Enterprise.*

Senator ERVIN. I am delighted to welcome you to the subcommittee and express our appreciation for your willingness to come and give us the benefit of your observations on what I think is a very important question.

I want to say I find myself in 100 percent agreement with the opening statement, which you have given the subcommittee. I am a convert to the conviction that a shield law is necessary.

STATEMENT OF NORMAN A. CHERNISS, EXECUTIVE EDITOR OF THE PRESS AND DAILY ENTERPRISE, RIVERSIDE, CALIF.

Mr. CHERNISS. I am a convert, and a reluctant one, to the conviction that a shield law is necessary. But neither the relative lateness nor the reluctance with which I come to my conversion make any the less firm my conviction that a newsman's privilege is essential; that confidential information and the sources of any confidential information procured for publication or broadcast must be so protected; that this privilege must be unqualified and that it must be certified by national legislation and national application, if possible, and with all relevant state and local, as well as Federal, proceedings falling within its purview.

My own metamorphosis, which is perhaps not untypical, can be accounted for by time and events. The events, which bring about these hearings, are now sufficiently familiar not to require yet another recital.

When I went to work as a newspaper editor in California 20 years ago, that State's shield law, said to be the best in the country, had already been in effect for 18 years. In 1935, the California Legislature had given newspapermen statutory immunity from contempt citations. In the years between 1935 and 1964 only one California case is reported involving the newsmen's privilege and in that case a finding of contempt was dismissed. Parenthetically I might add that in 1961 the privilege section of the appropriate State code was amended to include newsmen connected with press associations, wire services and broadcast stations; in 1972, as a result of the *William Farr* case, immunity from contempt was extended to include proceedings of any judicial, legislative, administrative body or any other body with the power to issue subpenas.

Most conscientious newsmen, and I underscore that word "conscientious," I think, don't merely accept in principle, but insist in practice, that they have all the responsibilities of citizenship that burden lesser mortals and only the same rights. They ordinarily resent and resist special treatment beyond the convenience of a well-located press table and an immediately available telephone. They don't like special interest legislation, even—maybe particularly—when the "press" is the special interest.

I, and my publishers, for instance, opposed the Newspaper Preservation Act of 1970 exempting newspapers, under certain conditions, from the anti-trust laws. And, like many others within the newspaper business, we could not accept the argument—made in Congress—that it might be inhibitive of our first amendment freedom to keep newspapers under the 1971 wage-price guidelines mandated for other businesses, whatever else there might be to be said of the merits or demerits of those controls.

So, there has been, since 1935, a shield law on California's books, but neither I nor anyone else really had to think about it very much; the law was there and newsmen and lawyers who had to know about it knew about it for when it was necessary. As the record I cited earlier makes clear, it was rarely if ever put to use, and the legislature has been good about keeping it up to date, at least when new needs have dramatically arisen.

But when I did think of it over the earlier years, I had misgivings. We use the word "privilege" in virtually a dual sense, one with the legal meaning of immunity with which we're here concerned and the other the more general, broader, meaning of advantage. It seemed to me that "newsmen's privilege" was too much of the latter, an unjustified special favor, an unwarranted excuse from a responsibility of citizenship.

But events of recent years—some outside the state and some within—have, as I have suggested, changed my mind, altered the balance of my conception or interpretation of privilege. And even if California law affords better protection for newsmen involved in state proceedings, better protection than other states choosen yet to offer, it is not enough in this area of immunity. It is not enough that just California newsmen have this protection in most instances.

The confidential source, usually reliable or otherwise, has always been with us, but there has been a growing use by newsmen of confidential sources and confidential information. Contrary to the opinion and even evidence of others, I think it continues to grow despite the new fears of contempt if the newsman is called to testify and elects to keep his pledge. This growing use by newsmen of confidential sources and confidential information comes, I think, of simple need, that need rooted in the fact that fears of various kinds too often keep insecure people from speaking freely.

The political climate in this country, now and for some little time in the past, which does not always seem to foster the freest of speech, has something, very much, to do with this. Increased concern with job security does, too. There are doubtless many other factors.

Coupled with these inhibitions is the fact that more news organizations, and more individual newsmen of various kinds, spend more time investigating than used to be the case. This kind of journalistic investigation is far short of what it might be, let alone perfection, but there is more of it than formerly.

And as such investigative efforts go deeper and into more controversial areas, the greater the likelihood of encountering sources who, out of one kind of fear or another, have a legitimate claim to the protection of a confidential relationship with the investigator, if the truth is to come out.

That there is excessive use of this kind of relationship, I can't deny. It can be the lazy or timid reporter's crutch. I can't deny that there are regularly misuses of the confidential relationship involving newsmen and sources. I say though that it is often needed and when it is needed it is not merely legitimate, by any valid standard, but imperative.

Now we all know of the more celebrated instances of press freedom under seeming challenge, of which there has been a plethora in recent years, including those involving the subject before this subcommittee. And I have no particular new instance to add.

I am concerned that the focus has been perhaps too much, almost exclusively, on larger news organizations—national networks, metropolitan newspapers, et cetera—and their problems in this respect. This is understandable for a variety of reasons. Not the least of these is the fact that so much of the general problem concerning press freedom originates, from one source or another, in this Capital City, where only the larger media are ordinarily directly represented and where they are thought to have the greatest interest, if not influence. And many of these have in fact been subjected to threats.

But if I am to justify my appearance here today, I think I must make the case that if the most famous battles aren't fought down in the provinces, at least the fighting is significantly harder and more critical there.

I have great respect for such newspapers as the *New York Times*, the *Washington Post* and the *Los Angeles Times*, all of which have had what can certainly be called press freedom challenges, and I don't minimize those challenges. But I maintain unshaken confidence in their ability to endure, whatever, the forces with which they contend.

I'm not so confident of the endurance abilities of smaller newspapers, or broadcast stations, in smaller communities, courageous as many of them have been, if what now seems to be a wave of inhibition of press freedom spreads and intensifies.

Remember that in smaller communities not only are the people responsible for the news and editorial content of the newspaper, for instance, much closer to the people their newspaper is meant to serve—in much more immediate day-to-day contact with them—but the people served are much closer to each other, often more knowledgeable about what may be going on in the community, but not necessarily more willing to speak of it publicly and for attribution.

I think this has clear application to the subject immediately before us. Given the cited circumstances, I think the need for a legally guaranteed newsmen's privilege, and the concomitant protection of the sources themselves and their information, is at least as great for newsmen in smaller operations as in the largest and boldest. Given the pressures under which some of these smaller operations function on a day-to-day basis, it may well be greater.

Impressed as I might be by the willingness of, say, the *New York Times* or the *Washington Post* to stand up to, say, the President of the United States, I am more impressed by the willingness of a little cow county newspaper to stand up to a town judge. The challenge and the risk simply have greater immediacy; they are far more personal.

I would remind you, too, that the smaller news organization, when any facet of its press freedom comes under legal challenge, does not ordinarily have the ready and unlimited service of expert counsel. And often may even be inhibited by the expense of counsel of any kind. So, for that matter, may the counsel be inhibited, when he does not have clear statutory law to back him up.

I would like to offer a personal experience, or rather an experience of my newspaper, that I think is relevant to the issue of our mutual concern.

The Press and Daily Enterprise, a morning-evening combination, serve a county roughly the size of the State of New Jersey. In 1967—on the basis of information received in pledged and necessary confidence—we undertook an investigation of suspected irregularities in the administration of the program of guardians and conservators meant to enhance the well-being of a small band of land-rich Indians in Palm Springs.

This program was under jurisdiction of the superior court at nearby Indio. The investigation, which consumed a year, showed that while the financial well-being of the Indians involved wasn't being notably enhanced, a certain number of prominent local businessmen and banks, to whom the court had awarded the conservatorships and guardianships, and the very few lawyers specializing in these matters with assistance from the court, were doing very well indeed by way of fat fees. Often for no service performed.

At one time or another three judges—one before he went to the bench—were involved in this conservatorship-guardianship program. That involvement included the irregularities of which I spoke earlier. I'll skip further details, but none of the three is any longer on the bench and new laws have helped remove the profit motive in the administration of these Indians' financial affairs.

Much of the investigation to which I refer was simply a matter of hard, dull work, a reporter spending day after day over a period of months going through voluminous case files, an effort subsequently repeated by teams of Federal and state accountants.

But there was also the giving and receiving of considerable information which had to be in strictest confidence as to sources, and with the State's shield law to guarantee that the confidentiality could be kept. And this information was necessary to the investigation and vital to the results.

This confidential information came from Indians, not surprisingly fearful that they might suffer from any identification; from people in Government agencies having some direct knowledge of the scandalous situation which had grown up, and only slightly less frightened than the Indians at any thought of identification; and from some lawyers.

Lawyers, of course, again especially in smaller communities, are not notable for addressing themselves publicly to the failings of other lawyers, unless assured of confidentiality.

Of the multitude of bills introduced in this Congress meant to provide a national shield law of some sort, I think the one most deserving of support is that presented by Senator Cranston, S. 158, the Free Flow of Information Act. It has what I consider to be the particular advantages of all-embracing application—Federal, State, and local—and the privilege it would offer is unqualified.

And, again, I think the privilege has to be afforded without qualification, and for the usual and best reason—that any qualification would be a loophole to be expanded.

The need for qualification of the newsmen's privilege is most often asserted in behalf of considerations of "national security." I think that has come to have a very hollow ring. We have had—on a not wholly unrelated subject—too many efforts to paint clearly excessive secrecy in the Federal Government as being a matter of national interest or national security when it is in fact too often a matter of bureaucratic interest or someone's personal security.

If anything was needed to underscore beyond mistake the need for a newsmen's privilege, it has been those instances where agencies of law enforcement have in effect sought to use the press for their own investigative purposes, and when, more recently, even defense attorneys have tried, with the subpena, to employ the same technique.

Simply put, these are corruptive tactics, perverting the function, the very purpose and meaning, of a free and independent press, and the privilege is further necessary to guard against their further employment.

I don't know that the proposed "Free Flow of Information Act" is a perfect bill, or that it cannot yet be improved upon, and I am aware that the preemption it authorizes may prove constitutionally untenable.

But I don't know that a perfect piece of legislation is possible in this regard or in any other and I do know this one isn't going to be improved by weakening it.

If this or any similar bill must inevitably leave questions hanging as to whom exactly is entitled to the privilege, certainly it would not be unusual to consign any additional definition which events may require to the discretionary decisional powers of the courts.

In the light of certain court actions of late that may seem to pose a degree of risk which might not even have been thought of when the courts were universally considered the prime defenders of press freedom, but there is in fact no other choice.

Some newsmen, I blush to say, have been known to lie; some to resort even to damn lies. Some newsmen are fabricators, purely and simply, with no regard for truth and no concern for anything principled.

And beyond all doubt a national newsmen's privilege would be a shield for liars and fabricators.

So is the first amendment.

Beyond all doubt an unqualified newsmen's privilege is very, very chancy business.

So is the first amendment.

Thank you.

Senator ERVIN. I commend the excellence of your statement. You give us a very fine illustration of the fact that some protection of confidential sources is absolutely necessary if the press is going to perform its duty to enlighten the public concerning corruption and inefficiency in government.

I think there is no doubt in my mind that this constant threat of being compelled to disclose the sources of confidential information inhibits many newsmen from collecting information and writing about things that the public absolutely needs to know.

Also, I think it is an attempt to convert a newsman into an arm of government as an investigator, either for the benefit of the prosecution or for the benefit of the defense. It is an absolute perversion of the reason why we have our newsmen.

I think your closing statement points out what I have always maintained and, that is, if you give people any freedom, that freedom is going to be abused by some people to whom it is given. But the only way to prevent abuse of freedom is to abolish freedom.

I want to commend your very fine statement.

Mr. CHERNISS. Thank you.

As you know, this was prepared for delivery on February 28, which was before S. 1128 was submitted. I think I could perhaps endorse your bill, too, but I am confused by one thing in your bill, if I may say and, that is, the allowance for in-camera proceedings of the grand jury which have to be, but I would suggest that once a newsman goes into in-camera hearings to try to assert his right to immunity, he is awfully suspect whether or not he opens his mouth. The sources don't know.

Senator ERVIN. I put that in there with some misgivings, because I am a great believer that the court should always be open. I do think in the assertion of his privilege, there are times when an open hearing will have the effect of making public the very thing he is entitled to keep privileged.

Mr. CHERNISS. I think in most states the district attorney will be in those in-camera hearings.

Senator ERVIN. That is a development in the grand jury system which I deplore. In North Carolina, nobody is allowed to be in the grand jury room when a witness is being interrogated except the members of the grand jury and one witness. If the district attorney were to go in the grand jury room and they were taking testimony, the indictment would be quashed.

Mr. CHERNISS. But isn't North Carolina unusual in that respect?

Senator ERVIN. Yes, it is. I think the grand jury has been largely perverted from its true function. The main reason we have a grand jury is that it is supposed to stand between the government and the citizens, and see to it that the citizen is not placed on trial unless there is found probable cause for a grand jury to believe he is guilty. But we have had prosecuting attorneys go before the grand jury and we have had the grand jury converted into an investigatory arm of the prosecution instead of being a judicial safeguard.

I think it is a very unfortunate situation.

Mr. CHERNISS. I do, too.

Senator ERVIN. Thank you very much.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Charles F. Harrison, president, Radio Television News Directors Association.

Senator ERVIN. Mr. Harrison, I am delighted to welcome you to the subcommittee and wish to thank you for your willingness to come and give us the benefit of your views in a matter which is of much concern with people in your occupation.

You might introduce the gentleman who accompanies you for purposes of the record.

STATEMENT OF CHARLES F. HARRISON, PRESIDENT, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, ACCOMPANIED BY LAWRENCE SCHARFF, GENERAL COUNSEL

Mr. HARRISON. I certainly will.

Mr. Chairman, I glanced at the clock. If you would prefer, I will gladly submit my testimony on behalf of the Radio-Television News Directors Association to conserve time.

I am accompanied by Lawrence Scharff, counsel, who has the same feeling.

What is your wish?

Senator ERVIN. That would be all right. If you want to summarize it, that would be fine. We will print the entire statement in the record immediately following your remarks.

Mr. HARRISON. My testimony is available. I will say only very briefly, the testimony you have asks you to consider absolute privilege. Tied in with that testimony is a memorandum from Mr. Scharff which offers some new thoughts for your consideration in the specific area of libel.

I would like to thank this committee for the opportunity to present our suggestions and hopefully we will have better legislation in the immediate future.

The Ervin bill and other bills [illegible] absolute protection of confidential and unpublished information. Of course, are areas which have substantial agreement from our membership. Our membership is nearly a thousand individuals representing more than a thousand radio and television stations. We are pleased that the Senator favors a strong bill covering all branches of government—states as well as Federal.

While we have some reservations about some sections of your bill, we are most impressed by your efforts and those of the Constitutional Rights Subcommittee.

Senator ERVIN. Thank you.

I certainly agree with you—whether a broad privilege or a narrow privilege—it should be absolute and unqualified. If you have exceptions, the exceptions swallow the general rule and the general rule is gone. It is better to have a bill that is understandable—as simple as possible to achieve your objective—with as much freedom from interpretation as the human language permits.

Mr. Harrison. As a layman in reporting, I cannot agree with you more on the simplicity of legislation.

It has been said earlier today, we are right on the edge, and I agree with that and we hang precipitously with a little bit of comfort left. What little comfort there is on the Federal level is a temporary order from the Attorney General's Office that could be done away with next week or by a future administration. The climate across the country, to echo the statement of the man just immediately before me, in the smaller communities is one of urgent need.

Senator Ervin. Yes, I think the preceding witness indicated quite clearly that more protection is acutely needed by the smaller publications. The *New York Times* and *Washington Post* have enough power to protect themselves, but the little enterprises in the field of communications are very much handicapped.

Mr. Harrison. And the smaller publications and broadcasters don't operate within a shell contained by their state border any more. A statement by the Supreme Court has an immediate effect on the states on circuit court level. There is today in Indiana, a murder trial beginning. It is different from other murder trials only because the judge in that case, having read the Supreme Court decision in the recent case, will allow only one reporter in the courtroom. To make sure that the press coverage is proper, he will hand-pick that one reporter. Then, to make sure the people are properly informed, in his opinion, he will censor every word before that reporter can issue his digest to the Associated Press, the United Press, the newspapers around the country, and the radio and television stations.

I repeat, the matter is urgent.

Senator Ervin. Thank you very much.

Your entire statement will be printed in full at this point in the body of the record.

[The complete statement of Mr. Harrison follows:]

Statement of Charles F. Harrison, President, Radio Television News Directors Association, March 13, 1973

My name is Charles F. Harrison. I am the news director of radio station WGN and television station WGN-TV, Chicago, but I am appearing today as president of the Radio Television News Directors Association. Appearing with me is J. Laurent Scharff of the law firm Pierson, Ball & Dowd, general counsel of the Association.

Our organization, with a membership of nearly 1,000 broadcast journalists, welcomes the Subcommittee's current hearings as being of extreme importance. You are meeting at a time when the First Amendment is undergoing perhaps the most serious challenges since the Alien and Sedition Acts were adopted nearly two centuries ago. There is urgent need to counteract the threats to news freedom which are emerging from various branches of government at all levels.

One of the most critical dangers involves the problem immediately before you—the continued jailing of newsmen who refuse to give private, and often confidential, information to grand juries, courts, or other government agencies. I do not need to recount the instances which have developed in the wake of the 5-to-4 Supreme Court decision stripping newsmen of their First Amendment right to immunity. I urge you to take advantage of the virtual invitation of the Court majority to enact remedial legislation. Otherwise arrests will mushroom. Simultaneously, news sources will dry up, for fear of disclosure.

The American people will be the losers. They no longer will learn of corruption, errors, and incompetence in government, because public servants will not risk passing along such material even to trusted journalists. The actual jailing of individual newsmen is of secondary consideration; the paramount concern is that the checks on our democratic system will disappear.

Last fall the Radio Television News Directors Association joined with four other professional news organizations—the Joint Media Committee—in drafting a qualified shield bill. We thought at the time that a moderate approach would be sufficient. But thereafter the jailings of several newsmen made it clear that anything less than absolute legislation would not fully correct the situation. Consequently, at our December conference the members of RTNDA voted almost unanimously to favor an absolute shield bill. That is what we support today.

Broadcast newsmen have a particular interest in shield legislation for two reasons. First, some government officials and others seek to promote the notion that because radio and television stations are licensed, their news reporting should be less free than in the print media. We reject that concept. Broadcast news must be aggressive and hard-hitting, within professional news standards and ethics. Investigative reporting is becoming more and more an important part of electronic journalism. It must not be hampered; it must receive the same protection as investigative reporting in newspapers and magazines.

Second, the tools of broadcast journalism are unique. In addition to the reporter's traditional pencil and paper, we use cameras, microphones, and tape recorders. When not presented on the air, the resulting film and the video and audio tapes—the so-called "outtakes"—are as private, and often as confidential as mental and handwritten notes. We believe they merit the same legal protection, whether they are confidential or not. If newsmen are called on to produce their unused notes, film and tapes, the media will become known as instruments of government surveillance. This must not occur in a democracy. Too, there is the danger that officials will seek such material to make their own determination as to the fairness of a news story. They will endeavor to impose their own views of editing on free journalism.

We believe that shield legislation should apply across the board in government—not just to the court system, but also to the executive and the legislative branches at federal, state and local levels. We broadcast newsmen cannot forget that less than two years ago one House of Congress held contempt proceedings against CBS and its president for rejecting a subpoena to produce outtakes of television film.

Several of the pending bills would apply to the states as well as to the federal government. We support this broad coverage, because many of our problems have been in state proceedings. There are monumental difficulties in obtaining enactment of effective and—importantly—uniform legislation in each and every state. We recognize, however, that there is a serious question about the constitutionality of a preemptive federal law. We are aware that other witnesses at these hearings have presented the results of their research showing that such a law would be constitutional. We assume that the committee will assure itself that any state coverage provision is severable in the event of judicial determination of invalidity.

We are also concerned that the language of any bill reported by the committee should make it clear that the testimonial privilege is not intended to cover those persons engaged in official government information activities. With that exception, we concieve the purpose of such legislation to be the promotion of a free flow of information to the public by offering the law's protections to all of those who are involved in the process of gathering, reporting, or editing information—written or pictorial—for use in any medium of communication.

While we wish to emphasize our support for an absolute testimonial privilege for these persons—such as that embodied in S. 158—we urge you to consider nothing less than a highly protective qualified privilege bill, one which places the burden of proceedings and a heavy burden of proof on the person seeking to divest the privilege. At the very least, the testimonial privilege should apply in all circumstances *except* when there is a "compelling and overriding national interest in the information" (to use the standard of the Joint Media Committee introduced in S. 36 and H.R. 2230), or where there is "an imminent danger of foreign aggression, of espionage, or of threat to human life, which cannot be prevented without disclosure of the information or the source of information" (to quote S. 637).

RTNDA no longer believes that an exception for libel cases is desirable. Under the original proposal of the Joint Media Committee, the testimonial privilege would be withheld with respect to the source of any allegedly defamatory information when a defendant newsman or news organization asserts a defense based on the source of such information. This was intended to satisfy the fear of some that the news media might unfairly hide behind the testimonial privilege and that plaintiffs would therefore lose libel cases they would otherwise win. Our legal counsel believes that the applicability of the testimonial privilege would *not* appreciably affect libel case verdicts. On the other hand, the existence of a general newsman's protection is necessary to reassure confidential sources of information that their identities will not be disclosed—at least not without more compelling reason that a libel case that could itself be no more than the means for a fishing expedition or harassment of the press. A memorandum on this subject has been prepared by our counsel and is attached to my written statement.

Mr. Chairman, your distinguished record on behalf of First Amendment rights gives us hope that you and your colleagues will agree on legislation restoring a vital shield to newsmen and reopening the flow of necessary information to the American people. We are heartened by the bipartisan support accorded the various bills pending in the Congress. It is a recognition that freedom of the press and of speech, after nearly 200 years, is still regarded as a keystone of our Republic.

* * *

MEMORANDUM OF LAW CONCERNING A NEWSMAN'S TESTIMONIAL PRIVILEGE IN DEFAMATION CASES

Several pending newsman's privilege bills provide that the testimonial privilege shall not apply in a civil action for defamation with respect to the source of allegedly defamatory information, when the defendant asserts a defense based on the source of the information.[1]

We submit that such an exception to the privilege could *not* be a meaningful enough aid to plaintiffs in libel cases so as to justify its likely detrimental effects on the flow of news to the public. The inutility of the exception in those situations can be seen from a consideration of (1) the "actual malice" test of *New York Times Co.* v. *Sullivan*,[2] and (2) the defendant's burden to prove "truth" as a defense in cases not covered by the "actual malice" standard.

Public figures who are plaintiffs in libel and slander suits must show no less than that "the defendant in fact entertained serious doubts as to the truth of his publication." [3] Even stronger immunity from liability is suggested by the Supreme Court's statement that "only those false statements made with the *high degree of awareness of* their *probable falsity* demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government." [4]

With rare exceptions, possibly, neither the identity of the news source nor his testimony could serve to prove that the defendant newsman or his organization "in fact" had serious doubts about the truth of the statements made. This would be so even if the source were shown to be unreliable by an objective or "reasonable man" standard. [5]

In view of the high improbability that an exception to the privilege would be of legitimate usefulness to libel plaintiffs, the opportunities which such an exception would provide for displeased public figures to harass the news media, and to smoke out their confidential sources for nonjudicial purposes, should be foreclosed. Moreover, the mere existence of such an exception would often create grave doubt in the minds of potential sources of information about whether their identities could be kept secret.

This kind of weighing of the likely value of the evidence obtainable, on the one hand, against the First Amendment interest in protecting the newsgathering function, on the other hand, is found in a post-*Branzburg* [6] decision of the United

---

[1] S. 318, S. 451, and S. 750; H.R. 2230 and other bills in the House of Representatives.

[2] 376 U.S. 254 (1964).

[3] *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).

[4] *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964), underscored portion quoted approvingly in *St. Amant* v. *Thompson*, *supra*. In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court broadened the definition of public figures covered by these standard.

[5] See *St. Amant* v. *Thompson*, *supra*.

[6] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

States Court of Appeals for the Eighth Circuit. In *Cervantes v. Time, Inc.*,[7] the Court of Appeals affirmed the District Court in granting summary judgment for the defendant without permitting discovery of the magazine's sources of defamatory allegations.

The Court of Appeals opinion in that case showed that in still other recent libel cases the federal courts, even without benefit of statutory protection for newsmen, have not ordered disclosure of confidential sources without a positive showing of "cognizable prejudice" to the libel plaintiff—something which generally cannot be shown. The court stated that "to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to excessive restraint on the scope of legitimate newsgathering activity."[8]

The same conclusion—that a newsmen's privilege would not substantially affect the results in defamation actions—is reached upon consideration of the respective burdens of the parties in those actions in which "truth" is pleaded as a defense. In these cases not involving public-figure plaintiffs, the defendant publisher or broadcaster has the burden of proving the truth of the offending statement, once the plaintiff has carried the burden of providing publication, his identification, defamation, and, in some cases, damages.[9] Therefore, in these cases, if the confidential source is needed to prove the truthfulness of the defamation, the defendant can either bring forth the source or remain silent and risk loss of the case by failure to establish his defense.

In sum, the recognition of a testimonial privilege concerning sources in defamation cases would deprive plaintiffs of little or nothing, but the absence of the protection in such cases would likely inhibit the flow of information to the public from the confidential sources of newsmen.

PIERSON, BALL & DOWD.

Washington, D.C.
March 5, 1973.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Paul Branzburg, a reporter from the *Detroit Free Press*.

Senator ERVIN. I want to thank you for appearing before the subcommittee and your willingness to give us the benefit of your views in the field in which you are not only most knowledgeable, but rather sadly experienced.

STATEMENT OF PAUL M. BRANZBURG, REPORTER, DETROIT FREE PRESS

Mr. BRANZBURG. I would like to express my appreciation to this committee for considering legislation that might end the ghastly spectacle of American newsmen being subpenaed, harassed, and jailed for writing newsstories based on information from confidential sources.

As a reporter who has been twice subpenaed, who has been convicted of contempt of court, who has been sentenced to 6 months imprisonment, I welcome this opportunity to testify about the need for a carefully drafted reporter privilege status. But I speak only for myself and not for my present employer, the *Detroit Free Press*, nor for my former employer, the *Louisville Courier-Journal*.

In Louisville, where I was an investigative reporter from July 1967 to June 1971, I frequently found it necessary to use confidential sources for my stories. This was especially so in muckraking reportage and in stories involving professional criminals. There were at least

---

[7] 464 F. 2d 986 (8th Cir. 1972), *cert. denied*, U.S. No. 72–727, Jan. 15, 1973 (41 U.S. L.W. 3392).

[8] 464 F. 2d at 992–93, 994 and nn. 9–10.

[9] See Hanson, Libel and Related Torts §§ 218–21 (1969); Restatements, *Torts* § 613 (1938).

100 lawbreakers—including heroin addicts, bookies, fences, illegal drug dealers, burglars, prostitutes, and thieves—who allowed me to interview them, to spend days and even weeks with them, to observe them occasionally while they were working.

Of course, they cooperated with me only after they had extracted a promise that I would never reveal their identities. But for many of them, my promise alone was not satisfactory. These people would ask if I could be compelled to identify them if I were subpenaed by a grand jury. I always told them that Kentucky Revised Statutes 421.100 provided, in part, that "No person shall be compelled to disclose . . . before any grand . . . jury . . . the source of any information procured or obtained by him, and published in a newspaper . . . by which he is engaged or employed." I carried a copy of that statute, and it was often decisive in persuading criminals to trust me. That, and a reputation I developed for keeping my promise of confidentiality.

One example of the sort of work I did was a series published early in 1969 on illegal drug use in Louisville. It was eight newspaper pages in length, and it was based on almost 3 months spent with the whole spectrum of drug users—from the high school student who smokes marijuana to the hardened criminal with a $150 a day heroin habit.

I am proud of that series: It alerted Louisvillians to a local problem that few of them knew existed; it won a national journalism award; it was nominated for a Pulitzer prize. The response from the community was also heartening. Both policemen and drug users wrote me letters say that I had performed a valuable service, and I was later given an award by the Louisville-Jefferson County Crime Commission..

With this background, you can understand why I was totally unprepared for grand jury harassment when in November 1969, I wrote a short feature story about two young men who were operating a small makeshift laboratory for the conversion of marijuana to hashish. The men had agreed to let me visit their laboratory to watch them at work. They had done so only after I had promised them confidentiality and showed one of them a copy of Kentucky's reporter privilege statute.

A few days after the story was published, I was subpenaed before the Jefferson County grand jury in Louisville. I refused to identify the two hash manufacturers on two grounds. (A) KRS 421.100, the Kentucky reporter privilege statute, and (2) the first amendment of the U.S. Constitution.

I think the first amendment is a reporter privilege statute, and four justices of the U.S. Supreme Court agreed with me. Freedom of the press does not mean merely freedom to publish news, but freedom to gather it. Of what value is the freedom to publish news if you don't have the freedom to gather news? And newsgathering cannot be free unless reporters' promises of confidentiality are protected from grand jury harassment. The cold truth about newsgathering is that some sources will not, and cannot, provide information on anything other than a confidential basis.

In January 1971, I was again subpenaed, this time by the Franklin County grand jury in Frankfort, Ky. It seems that the grand jury and the local prosecutor were curious about a lengthy story I had written about illegal drug use in Frankfort.

In researching that story, I had spent several weeks talking to some 30 illegal drug users in Frankfort, including a middle-level government official, young professionals, and students. I had, of course, witnessed a number of drug offenses and the grand jury wanted to learn the identity of those offenders.

I refused to enter the grand jury room in Frankfort. The reason was that merely to enter the room would have chilled my relationship with my sources. Grand jury testimony is secret and so my sources would have been unable to determine whether or not I had betrayed them. Had any of them been arrested subsequent to my testimony, my criminal sources in Kentucky would have become suspicious and refused to deal with me on future stories.

Is there a contradiction in my unwillingness to enter the Frankfort grand jury room and my willingness to enter the Louisville grand jury room? The circumstances of the two cases explain my seemingly contradictory behavior.

In Louisville, my subpena did not reveal what information the grand jury sought, so it was conceivable—although highly unlikely—that the jurors sought my testimony on a matter having nothing to do with my work as a reporter. But in Frankfort the subpena stated that I was being asked to testify in the matter of violation of statutes concerning the use and sale of drugs. Therefore, the Frankfort subpena gave me legal notice that the reason for the subpena was my story about illegal drug usage in Frankfort.

Also, at the time of the Frankfort subpena, I was able to cite as authority for my refusal to enter the grand jury room the November 1970 decision of the U.S. Court of Appeals for the Ninth Circuit in *Caldwell* v. *United States*, 434 F. 2d 1081. This decision was not available to me at the time of the Louisville subpena in November 1969.

Finally, there was still another important difference between the Louisville and Frankfort cases. I knew the Louisville prosecutor's views and personality fairly well, whereas I didn't know the Frankfort prosecutor at all. This was essential because of the two basic options confronting me: (1) Refusing to enter the grand jury room and thereby publicly affirming that I would not betray my informants, or (2) entering the secrecy of the grand jury room and running the risk that I would not be asked to identify my sources. In the latter case, had any of my informants been subsequently arrested, they would have instantly suspected me and my reputation would have been destroyed.

I knew the Louisville prosecutor well enough to confidently predict that he would demand that I identify my sources, and that if I refused he would go into open court and ask the judge to hold me in contempt. That would have been sufficient proof to my sources that I had not betrayed them. That is why I took the calculated risk of entering the Louisville grand jury room. But in Frankfort I did not know the prosecutor, and the risk was too great.

However, in retrospect, I think I erred in entering the Louisville grand jury room. Whether or not I went before the grand jurors, I was going to be held in contempt. Therefore, I took an unnecessary chance of alienating my informants.

Ultimately, I was the subject of several decisions by the Kentucky Court of Appeals. Those decisions should be of some interest to this subcommittee because they illustrate how the highest appellate court of at least one state will engage in astounding sophistry to circumvent a reporter privilege statute. You will recall that KRS 421.100 stated:

> No person shall be compelled to disclose . . . before any grand . . . jury . . . the source of any information procured or obtained by him, and published in a newspaper . . . by which he is engaged or employed.

The court said:

> In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.
>
> The actual source of the information in this case was the reporter's personal observation . . .
>
> In all likelihood the present case is complicated by the fact that the persons who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as informants cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime.

In short, the court said that the phrase "source of any information" in KRS 421.100 simply did not apply to a case where criminals allow reporters to witness a crime.

If I had simply interviewed the two hash manufacturers, their role as informants would have been covered by the statute. But by trying to corroborate their stories by visiting the hash lab, I lost the protection afforded by the statute. The court thus implied that KRS 421.100 will sometimes protect and encourage mediocre reporting, while discouraging and punishing responsible journalism.

In June 1971, I left Kentucky to work for the Detroit Free Press and 1 year later the U.S. Supreme Court issued an opinion, *Branzburg* v. *Hayes*, holding that the first amendment is not a reporter privilege statute. On September 1, 1972, I was held in contempt of Jefferson County Circuit Court in Louisville and sentenced to 6 months' imprisonment.

The Governor of Kentucky has asked the Governor of Michigan for my extradition. If the Governor of Michigan decides to extradite me, I will either appeal his decision or return to Kentucky to spend 6 months in jail.

And this is what happens in America when a reporter writes a story based on confidential sources. The Louisville police did not know about that hash lab and if I hadn't written that story, they might never have known about it. For this public service I am rewarded with a prison sentence.

The Supreme Court's decision was a severe blow at the freedom of the American press to gather news and disseminate it to the public. Unless the Congress and State legislatures quickly pass good reporter privilege statutes, I fear for the future of aggressive investigative reporting in America. Already the Court's decision has affected the flow of news to the public by its deleterious effect on editors, reporters, and sources.

Several months ago I was talking to a middle-level heroin dealer in Detroit. I had known him for several weeks and I had been pressing him to help me gather evidence proving the corruption of a certain civil servant. Finally he made his decision. He started by telling me that I had convinced him I was not an undercover policeman, that I was the same Branzburg who had refused to reveal his sources to Kentucky grand juries, that I would go to prison in Michigan rather than reveal his name to anyone.

Then he told me that he thought it likely that the story would result in my imprisonment for contempt of court. He said that I probably would not like jail, that I would not relish getting raped, getting beaten. He said that after I had taken a few beatings, I might decide to betray him.

"If you decide to snitch, I would know about it," he said. "And I would have you killed before you even got out of jail. And since I don't want to have to kill a reporter for the *Detroit Free Press*, let's forget this story."

The heroin dealer's logic was infallible. I just sat before him in anguished silence. And the Detroit public may have been deprived of a story of no small significance.

The Supreme Court's decision affects not only sources, but editors and reporters.

Several months ago I won the opportunity to write a certain story that would perhaps have been unique in American journalism. I cannot tell you what it was about, because I don't want a grand jury subpena for a story that was never published.

I presented the idea to the editors of the *Detroit Free Press*. One of them said, "It's a great story." But they said I could not do it. They had concluded that I would probably be subpenaed to identify my sources and that I would eventually be cited for contempt of court. The story was "great," they said, but not of such huge significance as to justify the years of legal battles engendered by a grand jury subpena. In short, there is now a penumbra of stories that once would have been published, but no more. The loser, of course, is the public.

In fairness to the editors of the *Detroit Free Press*, I must say that they also rejected my story idea because they did not think it prudent for me to be sitting in a Detroit jail at this delicate moment when the Governor of Michigan is considering my extradition to a Kentucky jail.

The Supreme Court's decision last June obviously drives a wedge between confidential sources and reporters. But the Court noted that Congress and State legislatures are free to enact reporter privilege statutes. Thus, we have now reached an impasse in which the American press, after 182 years of living under the protection of the first amendment, must implore Congress to lead the way in asserting the right of journalists to make promises of confidentiality without the threat of subpenas and imprisonment. Therefore, I find it appalling that some of the reporter privilege bills before Congress would not have the effect of safeguarding a free press, but would further erode the ability of journalists to deal with confidential sources. These dangerous bills are the ones which afford newsmen a so-called qualified privilege.

I believe that the reporter's privilege must be absolute with respect to all information gathered by a journalist within the scope of his work as a newsman. I have four reasons for this position.

First, an absolute privilege statute not only protects the free flow of information to the public, but it promotes good law enforcement.

Qualified privilege statutes are against the real interests of police and prosecutors.

If the Congress enacts a statute which defines a fact situation under which a judge can order a reporter to reveal his sources, it will be in precisely that fact situation that sources will refuse to talk to reporters. The net result will not be more reporters identifying their sources to grand juries, but less stories based on confidential sources. If such stories do not get printed, police and prosecutors will lose whatever benefit they would have gotten from this reportage.

For example, the FBI undoubtedly learned something about the Black Panthers by reading Earl Caldwell's stories. If a qualified privilege statute is enacted such that Earl Caldwell can be compelled to reveal black dissident sources, he will never be able to deal with such sources, and the FBI will learn nothing at all from Earl Caldwell.

Prosecutors cannot have it both ways. If qualified privilege statutes build a wall between a reporter and certain sources, prosecutors will get nothing from reporters about such sources. If a reporter is given an absolute privilege, at least the prosecutor benefits by the reporter's stories.

At least two of the bills before the Senate are defective in precisely this way. They are S. 36, introduced by Senator Schweiker, and S. 318, introduced by Senator Weicker.

S. 36 provides that a litigant in a Federal district court may apply for an order divesting a reporter's privilege by presenting evidence that the newsman has information relevant to specific probable violation of law, that there is no alternative means of getting the information, and that there is a compelling and overriding national interest in the information.

This is absurd. It is precisely in the area of criminal violations of compelling and overriding national interest that prosecutors ought to be interested in getting some information from a reporter's stories rather than getting no information at all.

Suppose I made contact with one of the radical fugitives on the FBI's top ten-most-wanted list. And suppose, for his own reasons, he permitted me to spend a few weeks with him so that I could write a story about whether or not there is an underground railroad in this country which provides money and shelter to radicals wanted by police. My story would identify the fugitive, but I would have to promise confidentiality to the people who open their homes to him, because they would be committing the crime of harboring a fugitive.

If I were properly subpenaed before a Federal court, the U.S. attorney would forcefully argue that I knew about a specific violation of law relevant to a case before the court, that there is no alternative means of getting the information, and there is a compelling and overriding national interest in the information.

Surely the FBI and the U.S. attorney would be better served by the information in my story about the operation of this underground railroad than if they had no such information at all. But my source would never have agreed to let me do the story if he knew I could be compelled to identify his hosts. An absolute privilege statute would be in the interest of the FBI. A qualified privilege statute would not.

The second reason I favor an absolute privilege statute is that such legislation is relatively impervious to judicial and prosecutorial abuse.

These laws are written in absolute terms and it is difficult to meddle with them—unless a court wants to engage in pathetic sophistry of the sort we saw in the decision of the Kentucky Court of Appeals.

Qualified privilege statutes are subject to abuse because whatever exception you draft wherein a reporter can be compelled to testify, that exception will be expanded by zealous prosecutors and judges until there is nothing left of the reporter privilege statute.

For example, S. 36 speaks of cases of compelling and overriding national interest in the information. That is a phrase that is infinitely expandable, just like the phrase "interstate commerce."

Can it be argued that Jack Anderson must reveal his source for copies of records from the Bureau of Indian Affairs because there is a compelling and overriding interest in bringing to justice those who are in possession of stolen Federal records?

Could the *New York Times* have been compelled to reveal its source for the Pentagon Papers because such disclosure would be of compelling and overriding national interest?

The third reason I am in favor of an absolute privilege statute is because reporters need certainty when dealing with informants. A source wants to know with precision whether or not the reporter can be forced to reveal his identity. An absolute privilege statute offers such certainty. But a qualified privilege statute is always uncertain.

How can a source know whether or not a judge will deem the identity of the source of compelling and overriding national interest? Who is to know how various Federal district judges will interpret that phrase? Such uncertainty will cause many sources to refuse to run the risk of confiding in a reporter.

Finally, I am opposed to qualified reporter privilege statutes because I think they are unconstitutional. The first amendment says that "Congress shall make no law * * * abridging the freedom * * * of the press." Qualified privilege statutes define fact situations in which reporters can be compelled to reveal their confidential sources. In those fact situations, reporters will not be able to freely gather news. This is precisely the opposite of what I think the Founding Fathers intended when they wrote the first amendment.

Do you think that the Founding Fathers intended that reporters not be able to talk to criminal sources? Under British law, the Founding Fathers themselves were revolutionary criminals.

There are those who argue that since newspapers have to obey Federal statutes dealing with income tax, postage, collective bargaining et cetera, then why shouldn't reporters be required, like other citizens, to obey subpenas?

Requiring newspapers to adhere to tax, postage and labor laws is a reasonable demand that newspapers obey the rules governing all businesses, but requiring reporters to reveal sources strikes at the very heart of the ability of newsmen to gather news.

But, you might ask, does the press think it is special, above the duty of the ordinary citizen to answer grand jury subpenas?

Yes, I do think the press is special. The press is the only business singled out by the Constitution for special protection. The founders of this country wrote the first amendment because they recognized that the American democratic experiment would fail without a free press. Newsmen play a special role in this country, and if we are going to fulfill our constitutional obligations, we have got to be given the special protection implied by the first amendment and denied by the U.S. Supreme Court.

Thank you.

Senator ERVIN. I want to commend you on the excellence of your statement. I am incapable of comprehending how the court read the interpretation of the Kentucky statute, that no person shall be compelled to disclose before a grand jury the source of any information secured and obtained by him and published in any newspaper by which he is engaged or employed, as not applying to your case.

The word "information" is a rather broad word and it certainly should be interpreted to not only cover what you gain by statements made to you by others, but I think it is broad enough to cover what information you gain by the exercise of your own sense of sight. Therefore, in your case, that statute seems to me to be a complete protection, not only to the identity of these parties but to what information you obtained about the activities from the exercise of your own senses.

Mr. BRANZBURG. That is what I thought it was, yes.

Senator ERVIN. It looks to me like you should have been absolutely protected.

I agree with you that any newsmen's shield law that is passed should be, whether it is broad in nature or narrow in nature, should be absolute and unqualified. I think many judges are prone to interpret the law as the Kentucky court did so as to obtain information even where the law plainly intended that such information should not be obtained.

I agree completely with your concluding statement. The press is the only business that it protected specifically by the Constitution. This protection is given to the press, not for the benefit of the press, but in order that the people of the United States might know what is going on in this country and also that people in any community might know what is going on in their community.

I have to run off now, but I want to thank you again for appearing here.

Senator TUNNEY. I just have a couple of questions.

I am sorry that I got here a little late but I have had the opportunity to scan your statement. It is a good statement.

I think that many of us admire the courage that you have shown in the past and I think that it is clear from the statement that you have made the reasons that you have shown that courage because of your very profound belief in a free press.

Now, I have a question with regard to the personal witnessing of a crime by a reporter. You personally witnessed a crime?

Mr. BRANZBURG. Yes.

Senator TUNNEY. What about the question of who is the reporter?

Mr. BRANZBURG. That is a very hard one to define. I haven't been able to figure it out, but of course I think the privilege should go to more than just working journalists on big city newspapers. It has to include, obviously, all regular newspapers, but after that, magazine journalists, and authors of books, and it should go on to members of the Underground Press. But I don't know where to draw the line. It is a rough one.

Senator TUNNEY. It is a rough one and on this committee we are going to have to attempt to draw the line. There is nobody, I am sure, who has thought about this more than you have over the years and it would be helpful if you could give us some kind of definitive, within your own thinking, definitive thoughts as to what the scope of the newsman's privilege ought to be when we talk about the definition of newsmen and who is a newsman. This is something that I find of very deep concern.

I started off in these hearings generally favoring an absolute privilege. Then I retreated back from that position after I listened to some of the witnesses, and now I find myself moving back to the direction of an absolute privilege, but with a careful description of who is a newsman. I agree with your statement that a man, if he is not acting as a newsman and just walking down the street and sees a crime, that he ought to be required to testify but not in his capacity as a newsman.

Mr. BRANZBURG. I think the scope of the coverage ought to be very broad, but I still don't know how to draw the line. What did the Founding Fathers have in mind when they talked about the press? A lot of them just owned a small press and would run off an occasional sheet. If they thought of that as the press, should we still think of that as the press? I have seen neighborhood mimeographed sheets that are more informative about what is going on in the community than the local newspaper.

But there are problems of giving coverage to those kinds of journalists.

Senator TUNNEY. Yes, you see I must put out five or six press releases every week. That might be called propaganda by some people, but I am not a newsman.

Mr. BRANZBURG. You are not engaged in journalism with confidential sources.

Senator TUNNEY. There is an awful lot of confidentiality with what I do. We carry loads of secrets in our brains.

But if you do have subsequently any thoughts on the definition, I hope you would make it available to us because I think that of all people, with the kind of background that you have, with your obvious intelligence, you could give us a very good helping hand with a definition.

Mr. BRANZBURG. In a few weeks I will be engaged in a workshop at Hampshire College and we are all trying to draft a privilege statute and maybe I will come to some conclusions.

Senator TUNNEY. Good.

Counsel has a couple of questions.

Mr. BASKIR. You know, Mr. Branzburg, while Senator Ervin's bill is very broad in its coverage, it has a Branzburg exception because all the other well-known cases would probably be covered under Senator Ervin's bill, but you would still be in contempt of court.

Now, it appears to me that it is a small exception and a reasonable exception. Its impact on news reporting will be very small. In effect, all that the exception will do will be to require reporters like yourself to change the way you gather news in those small areas, but won't affect the actual newsgathering itself. I make that statement because I want your comment on it.

Mr. BRANZBURG. I think it will do a lot more than that. I think it is dangerously deceptive for a number of reasons. The reporters will have no access to people who are engaged in something which is considered illegal. If I want to talk to some people who are contemplating violent revolution, I won't be able to talk to them. If I can't talk to them, the public will not know what they are up to.

I think the public benefits by my talking to people like that.

There are any number of criminal sorts who might talk to a reporter. There is no public benefit with that kind of exception. If they don't talk to reporters, they will be unable to have a voice in the press and the prosecutors will know less about them. If there is an absolute privilege statute, at least the prosecutors and public benefit.

Mr. Baskir. I would point out that this exception doesn't exclude from protection the identity of somebody who has committed a crime and tells you about it later. What it does is to cover what Senator Tunney was talking about: eyewitness personal observation of the commission of a crime.

Mr. Branzburg. If someone tells me they are involved in large-scale drug dealings, I will try to verify what he is telling me and see the drugs and watch him deal. I think that is responsible journalism. To accept it on his say-so, without attempting to check his assertions, is, I think, irresponsible. I think that kind of exception encourages irresponsible journalism.

Mr. Baskir. I think when you come to that, Senator Ervin's language does not excuse newsmen from identifying any persons who commit a crime in their presence. Quite clearly, in your case, you could not have seen the hash factory; you could only have interviewed the people outside the building.

Mr. Branzburg. I don't believe people unless I can check up on what they say. I try to check as much as I can and I certainly wouldn't have taken their word unless I witnessed it.

Mr. Baskir. That is the exception in news reporting.

Mr. Branzburg. I am not really all that interested in the subject of drugs per se, but one of the reasons it fascinates me is because people who are involved in drugs are often able to give information about public officials who are taking graft, allowing drug traffic to go on. One of the ways reporters can find out about that is by talking to the dealers themselves, and there is no way to hang around with them without watching what they are doing. Otherwise, you are never going to get the opportunity to write a story exposing public officials. It just so happens there is heroin traffic partly because the police departments have a large number of police who are taking graft from dope dealers, and the only way to get the information is to deal with the junkies and heroin dealers.

Mr. Baskir. Suppose you are accompanying a drug dealer around the city and you observe him negotiating with a police officer. You write a story. Even though you have that relationship with the dealer, you write that story. Under Senator Ervin's bill, you would have to identify the policeman in order to identify the goods.

Mr. Branzburg. I would have to identify him anyway. The way it works, policemen don't come to pick up the graft at a fixed time. They don't say, meet me at so and so corner. They say, I will be around. And then they show up at a certain location, usually at a place where drugs are being used or sold and just walk in unexpected at 3 o'clock in the morning. How is a reporter supposed to be sitting around there posing as a heroin addict without witnessing crimes? It is impossible.

Mr. BASKIR. You say you would identify those police officers?

Mr. BRANZBURG. Right. And I also said I would never reveal anything that I saw going on in a dope dealer's house in return for that opportunity to get that crooked police captain or sergeant. I would say that such an arrangement is an ethical one. In fact, police do it all the time. They make arrangements to look away from an informant's crimes so they can get other criminals.

Mr. BASKIR. Thank you.

Mr. SNIDER. The State legislature has obviously made a judgment that the criminal activity they are prohibiting is not in the interest of society. What would give the reporter the right to supersede that judgment and determine that it is more important that society be informed that a law is being broken than to reveal what he knows?

Mr. BRANZBURG. It seems to me that the first amendment was written because the Founding Fathers recognized that you could not have a democracy unless the people were informed. In this country, theoretically, the people are supposed to be the governors and the ones they elect are supposed to be the representatives and the people cannot govern unless they are informed. That is why the publication and gathering of news has to be given protection.

There is no way to get certain kinds of stories unless reporters have that kind of protection. It really frightens me an exception like that in Sam Ervin's bill would cut off reporters from certain kinds of sources. I think if Thomas Jefferson and George Washington were out there today cooking up a revolution, I couldn't talk with them under this bill.

Mr. BASKIR. You could talk to them but not witness their activity.

Mr. SNIDER. I was trying to have you pin down the interest of society in having this information revealed. Is it in knowing that law enforcement is not performing its role? Is it in knowing that the criminal law is impractical and doesn't work? Do you see what I am getting at?

Mr. BRANZBURG. To give you an example, I wrote a series about drug abuse, eight newspaper pages long, a pretty good series, and the town didn't know anything about drugs. They were at that stage that they were unaware that drugs were in Louisville. There were junkies all over the place. There was no way I could inform them about drug abuse in Louisville without spending months running around with users in Louisville. In the course of that time, it is impossible not to witness crimes. You do it. I think the public benefited. If I was unable to witness crimes, I think the public would have lost. I think it is in the interest of police and prosecutors to get that information. If I hadn't had the privilege, they wouldn't have had any information at all. They wouldn't have the benefit of what I gave them.

Senator TUNNEY. I couldn't agree with you more on the point that you are making. I think the greatest advantage of the free press is the ability to look behind the veil that the power structure puts up with regularity, to pierce that veil, and to identify corruption where it exists. I think we desperately need that in a free society. In a totalitarian state which hands out power, people are expected to assume that everything is going on, but in a free society we know that is not true and we ought to be able to identify those people who are violating the law and who are corrupt. When I say the power structure, I say it in generic terms, not just public office holders, but also bureaucrats, police officers, people who regulate our lives with their decisions and their actions, and we have to be able to identify those people if they violate the law.

Mr. **Branzburg.** Let me give you another example of how I think the exception in Senator Ervin's bill is a bad one.

I recently wrote a story in which I spent 6 weeks to get the information, about the mayor of a town near Detroit. He had entered into a silent partnership with a group of businessmen. They bought a piece of land and the mayor of this town never revealed to his constituents he was in the silent partnership. He voted to rezone that property and without telling anyone he was involved in it. As a result of that rezoning, he and the other businessmen made a killing. Somebody had to give me a copy of that silent partnership. Silent partnerships aren't things you go to county buildings and public files to get.

When he gave me that piece of paper, he committed a felony or a misdemeanor right on the spot. I can't identify that source. I witnessed a crime because his handing me a piece of paper was a crime. But a good story developed as a result of it. The public learned of this mayor's activities and he admitted that he had been involved in a conflict of interest.

It also seems to me that it is bad to write legislation worrying about these little fine exceptions. There are always possibilities for abuse in any kind of statute. For example, if any of you gentlemen right now libeled somebody, say, libeled one of the editors of the *Deroit Free Press*, he could not sue any of you before libel because anything you say before this committee is immune from a libel suit. I think this is generally good that you have this privilege, but it can be abused, as Senator McCarthy did all the time. He libeled people and hid behind his immunity.

There might be times when a reporter will abuse an absolute privilege statute, but it nevertheless is a bill we need.

Senator **Tunney.** You have convinced me. I was convinced before you spoke but I think you have spoken as eloquetly as any witness we have had before this committee and who has expressed that point of view.

Thank you very much.

Our next witness is Mr. Abe Mellinkoff, the city editor and columnist for the *San Francisco Chronicle*, and I might say one of our distinguished citizens in California.

It is a great pleasure to have you with us.

STATEMENT OF ABE MELLINKOFF, CITY EDITOR AND COLUMNIST FOR THE SAN FRANCISCO CHRONICLE

Mr. **Mellinkoff.** I realize that it is hardly news that as a city editor I speak in favor of legislation that will permit reporters to keep their word to confidential sources without being forced to go to jail to do it. My only hope here is that I may provide a few notions on the subject that may make passage of required legislation more certain. I might add, however, that I am not banking on it because despite the many heroic words said on our behalf by people in high places, journalism is not the most popular undertaking. A lot of people gag at the very thought of us. And sometimes I don't blame them.

The present controversy over a law to shield reporters from the demands issued by officialdom, high, low, and in between, has aroused a lot of heat and resultant steam. But for my money, this is still no Armageddon between the hosts of governmental evil and journalistic good. For one thing, I do not believe that President Nixon wants to destroy the free press. And what is more, I don't believe he could if he were of such a mind. Furthermore, Vice President Agnew—even in his more dashing period—didn't intimidate me or any other competent newspaper person, even though a few Chicken Littles for their own purposes may have screamed that freedom of the press was failing.

A more accurate assessment is that the administration would surely like a more favorable press. Who can fault them for that? It must also be underlined that even the President of the United States is protected by the first amendment for freedom to speak his mind. And in a few years when Mr. Nixon retires to California, he will be relying on us of the press for news of what is going on in Washington and if the Orange County officials are trying to raise the taxes on his home in San Clemente.

That, in fact, underscores the central issue in this struggle for this shield legislation. Its purpose is only incidentally to shield the reporter and the editor from harassment. Its basic purpose is to make possible the flow of information to the citizenry in the belief that only an informed people can make sure that democracy will survive. That's a bit grandiose, I concede, but I believe it completely. Just about all of us in professional newspapering do.

I have read many shield bills that have been introduced in this Congress. I think the number has now passed 2 dozen and the session is young. The preambles of all those that I have seen are ringing in praise and defense of press freedom. But then follow paragraphs of legalisms that would faze most editors and all reporters in the midst of a fast-breaking story. One fears that interpretation and application of most of the bills could very well clutter up newspaper city rooms with company lawyers briefing reporters and provide officeholders at all levels with excuses for delaying and frustrating gathering of the news.

The entire first amendment itself is only 45 words long and something in that range is required for the new law. Senator Cranston's proposal could meet the need. The privilege, in his bill, is unqualified and complete. News sources and news information intended for dissemination are protected from any snooping by any government at any time, or any place.

The question immediately is raised: Can such a law be misused by persons who only loosely qualify as journalists? Yes, indeed. The extreme right, the extreme left, and the less well defined lunacies in between could use such a law in a manner to cause annoyance, exasperation, or revulsion. But as the self-proclaimed journalists of those persuasions rarely know anything that anybody in government or out of it for that matter wishes to share, I feel their use of a shield law would be most limited. As we all know, virtually any law, no matter how desirable, can be used for undesirable ends. The modern highway that is vital for us nice people is also used as a fast getaway for a bank robber.

In asking for a sweeping shield for journalists, we must not overlook that the first amendment, which is our more basic protection, is not as absolute as is sometimes stated. The penalties of both civil and criminal libel serve as very real limits, and real protections for the general public.

Also we must not forget the still valid judicial words of Oliver Wendell Holmes, when he wrote a majority opinion for the Supreme Court in 1919: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic. The question in every case is whether the words are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Thus, as there are limits to free speech, there would be limits, in practice, to the use of the shield law. It is not mandatory, only permissive. In none of the thousands upon thousands of stories I have either written or edited for the *Chronicle* have I ever knowingly compromised the defense of this country or impeded its law enforcement. Shield law or not, I plainly would not alter that course.

Operation of such a law, I find, is sometimes misunderstood by those not in this business. Only in fiction does the top North American agent of the Soviet Union call up the city desk and offer to tell how he has burrowed under the Pentagon to install telephone bugs on the promise the paper will conceal his name from the Feds. On the contrary, some little old landlady, who doesn't want to get involved, will tell a reporter friend about strange goings-on in apartment 6–C. The information very often is promptly turned over to proper authorities.

Who does ask for anonymity when talking to newspapers? A prominent businessman gave me the first lead that led to the imprisonment of a city assessor. The businessman was afraid to have his name used for fear his own taxes would go up if the assessor beat the rap. Exposure of illegal expenditure of Golden Gate Bridge funds was uncovered with the help of a timid bookkeeper. A Federal Home Loan Bank office was sloppy in checking on practices of a lending institution. An employee at the bank led us to the story and eventually we believe to better procedures by the bank. Even our science reporter talked with still unnamed violators of drug laws to learn better of abuses in drug treatment centers.

My list could go on and on; every newspaper could supply its own stories that were only possible because news sources knew they could never be named to anybody. We must keep their faith.

Mind you, newspapers will survive—and quite easily—without the proposed law. Probably no more than 1 percent of all editorial space is devoted to stories where confidentiality is involved. But it is that 1 percent that allows the press to pursue its full obligation to the public. Only if we are free to gather the news can the people's right to know be much more than a barren shibboleth.

Senator **Tunney**. Thank you very much, Mr. Mellinkoff.

I want to say from the record, you come from a very distinguished family in California. Your father is very distinguished, and David Mellinkoff, an attorney, both living in southern California, both of whom I know. Yours is an unusual family and I think you have demonstrated the warmth of your doctor-father and the legal skills of your lawyer brother from the testimony you have given today.

Mr. **Mellinkoff**. Thank you very much.

Senator **Tunney**. When we had an editor from California here recently before this committee, he took the side that over $200,000 had been spent in defending his reporters from subpenas, subpenas issued by prosecutors, subpenas that had been issued by grand juries, issued by defense counsel, plaintiff counsel.

Has the *Chronicle* had to spend large sums of money to defend its reporters?

Mr. Mellinkoff. Well, I don't watch very much the bookkeeping arrangements at the *Chronicle*, but I know we have spent money fighting various cases to insure confidentiality of our news sources. In fact, earlier this morning, they mentioned the only time in the last, I think, 30 years that a reporter in California had been challenged on our own State shield law, and it was the *Chronicle* that carried that case up to the State supreme court and won.

I am sure the lawyers also overcharge, Senator Tunney, you understand that is sort of a customary procedure, I understand.

Senator Tunney. Everybody on this committee is a lawyer.

Mr. Mellinkoff. But I don't know how much it costs us. No, I can't say. But we do spend money with our lawyers continually to try and protect the confidentiality of our sources.

Senator Tunney. What about the smaller newspaper? It can't afford to spend that kind of money to protect its reporters, can it?

Mr. Mellinkoff. No, we have a law firm where I can call up somebody, day or night around the clock. I am sure that kind of financial burden could not be borne by many of the smaller news gathering agencies, newspapers or radio stations.

Senator Tunney. Have you noticed any difference in the number of subpenas that have been issued against reporters in the last 2 years as contrasted with a number of years ago?

Mr. Mellinkoff. No, I can't honestly say in San Francisco. There have been a lot of threats of subpenas, San Francisco being a nice cozy small town, and I sometimes call prosecutors of various stripes, local and Federal, and tell them that it is a waste of time; that I'd be very happy to give them Xeroxed copies of anything in our library within reason, but we do send a librarian to identify those articles, which appear in the *San Francisco Chronicle*.

But I make it clear if they go beyond that we are going to be annoyed and they are not going to get any information. So far, that has been pretty successful.

Senator Tunney. Has the *Caldwell* case had a visible impact on sources?

Mr. Mellinkoff. It would be nice for me to say, yes, that is, it would add to our case but I can't say that I have noticed any diminution of sources because of the *Caldwell* case. I would hope the community, and by community I mean northern California, knows that the *Chronicle* would not reveal sources. I have mentioned that in speeches and I hope the word gets around and, thereby, I hope we are still getting a good flow of confidential information.

Senator Tunney. We have heard witnesses who occupy similar positions to you who say it has had an impact upon sources and that sources now are deeply concerned that their identity will be revealed if, as a result of the confidentiality tip, and the story that is subsequently published, there is a grand jury investigation and subsequent criminal prosecution. You have not had that problem?

Mr. Mellinkoff. No, I would like to be able to say that, and it would help my case, but it is pretty hard for me to imagine a source coming up and saying: look, I would tell you this, so and so and so and so, but I can't tell you because of the *Caldwell* decision.

Senator **Tunney**. Not because of the *Caldwell* decision but because they realize that—well, for instance, the *Farr* case got a lot of publicity around the country, particularly, in California.

Mr. **Mellinkoff**. Yes.

Senator **Tunney**. Mr. Branzburg was suggesting in the case, apparently, that he was able to write a story about this which a person who was involved with an illegal transaction, a corrupt transaction between a city councilman and third parties, would not in all probability be made available to him because the tipster was sophisticated and would probably know now that he may very well have his identity revealed if it came to the question of having a reporter go to jail in contempt of court if he refused to divulge the source.

Mr. **Mellinkoff**. Well, without revealing secrets of stories that have not yet appeared in the paper, we are in the midst right now of investigation, getting full cooperation from a lot of people on the public payroll—I am making the generalization purposely—which I think will end in a major governmental scandal. We have had normal difficulties in gathering the stories, but I can't say in all honesty, I have noticed any more difficulties because of the current problem with Farr and Caldwell and so forth.

Senator **Tunney**. I would like to ask you a question regarding the definition of newsman. What kind of a definition should a newsman have?

Mr. **Mellinkoff**. In my brief statement I dodge that question and was hoping you would not ask me about it, but I see you have and properly.

I would use the term "professional journalist," and by that I mean someone who makes a living in some phase of gathering, editing, commenting on news, by any media, whether magazine, newspaper, radio, television. I didn't go beyond that.

Senator **Tunney**. Is the reporter for the *Berkeley Barb* a reporter?

Mr. **Mellinkoff**. I can say a reporter for the *Berkeley Barb* is a reporter. Whether we like that paper—it is one of the underground newspapers and some read it and some don't. I read it; I have to and a lot of other various publications of various kinds. He is a professional journalist. He is making his living by gathering items of one kind or another.

Senator **Tunney**. How about an author?

Mr. **Mellinkoff**. You mean like Arthur Schlesinger, Jr.?

Senator **Tunney**. I think it is in the heart of every newsman eventually to write a book and many of them do.

Mr. **Mellinkoff**. Senator, I think there is not the immediacy with books that there is with journalism, weeklies, monthlies, quarterlies. As has been said by professionals, Arthur Schlesinger is considered a journalist by many historians and a historian by many journalists. Could he wait 6 months or a year to write his *Thousand Days?* Perhaps he could wait a couple more years and still satisfy his needs to live up to his scholastic obligations.

Newsmen in all the media are in a completely different situation. Usually by the time a person gets around to writing a book and getting it published, confidentiality is long gone.

Senator **Tunney**. How about the shield law?

Mr. **Mellinkoff**. Well, I can't define where I would draw the line, but I would say, let's get this present law passed.

Senator **Tunney**. Like Tom Paine; a modern Tom Paine?

Mr. **Mellinkoff**. I say, I haven't thought that one through, Senator, but I say, let's get the present law passed as Senator Cranston has sort of defined it and then let's wait and see what the courts do with it. Perhaps the law should be amended later. In the meanwhile, I think we can perhaps solve 98, 99 percent of the problem. It would be nice to be 100 percent, but I think we can wait for that if we can get this part done.

Senator **Tunney**. One last question.

Mr. **Mellinkoff**. Surely.

Senator **Tunney**. Assuming you can't get the Cranston bill, are you willing to accept any modification, for instance Senator Ervin's proposal? I am putting you on the spot, inasmuch as this is his subcommittee.

Mr. **Mellinkoff**. I don't think it is a good policy in fighting the war to create defeats in advance. I guess this is a war so we say we don't want anything less than total victory with honor. Therefore, I don't think I would care—if necessary—I haven't studied his bill thoroughly but, of course, being a good liberal, would take a half loaf rather than lose a half loaf and I think our cause is just for a total shield bill.

Senator **Tunney**. You heard Paul Branzburg testify regarding the exception in Senator Ervin's bill that would exclude from the exception the witnessing of the crime, such as he witnessed in seeing drugs manufactured or bagged or whatever it was. Would you agree with Paul Branzburg in his testimony, in opposition to the exception?

Mr. **Mellinkoff**. I think the exception could be misused and abused and, therefore, I would not be in favor of the exception. I think I go along with—if I walk out of this hearing room and see a crime committed, I would have no privilege, the shield law would not affect me. But it seems to me anything we observe in the process of covering a story or gathering a story, should be protected.

Now, a competent reporter will weigh what he is getting into, whether or not it is a minor story. If he knows he is going to have to observe, let's say, a capital crime, he will back off of it immediately, will not get himself involved in a situation like that and a lot of reporters refuse.

But I think to put it in the law is really unnecessary, at least at first blush. Let's see if this is misused, wholesale, and I think amendments should be made at a later time.

Senator **Tunney**. The thing that impresses me about an absolute privilege is that it was assumed by many for 170 years that there was an absolute privilege. I think that was abused. It was only the *Caldwell* decision that brought the issues to the forefront to make people stop and think maybe we didn't have the rights we throught we had all along that was really subsumed by the Constitution and the acts of reporters all these many years.

I suppose individual examples: I can't think of any offhand, but I am sure the record will demonstrate there are instances in which there have been abuses. But I don't think wholesale abuses.

Mr. **Mellinkoff**. Of the first amendment?

Senator **Tunney**. Prior to *Caldwell*, at the time it was assumed there was an absolute privilege.

Mr. **Mellinkoff**. I don't know of any wholesale abuse. I am sure there were some. The first amendment is only what the current Supreme Court says it is, and in that decision, however, the *Caldwell* decision, I think it was Justice Stewart—one of them sort of passed the ball to Congress to say that such legislation is necessary if the first amendment is to mean what we have thought it meant. I have forgotten exactly his words in that decision, but that was the sense I got from it.

Mr. **Tunney**. Well, your testimony has been very helpful and we really appreciate your being here and giving us the benefit of your efforts.

Mr. **Mellinkoff**. Thank you so much.

Senator **Tunney**. Our last witness is John R. Finnegan, chairman, Freedom of Information Committee, Associated Press Managing Editors Association.

STATEMENT OF JOHN R. FINNEGAN, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE OF THE ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION

Mr. **Finnegan**. Mr. Chairman, I understand you have a 2 o'clock meeting.

Senator **Tunney**. I have a 2 o'clock executive session of the Judiciary Committee, which means that even if I wanted to continue these hearings, I could not because of the rules of the committee, but inasmuch as this 2 o'clock meeting is extremely important, I would like to close up these hearings no later then maybe 12 minutes of 2 to give me some time to get over to the other room.

Mr. **Finnegan**. What I propose to do is submit my full testimony and merely summarize for you and keep it brief, and then I am sure you would like to ask questions.

My name is John Finnegan and I am the chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association. I also am executive editor of the *St. Paul Dispatch and Pioneer Press*, St. Paul, Minn.

The Associated Press Managing Editors Association is an organization representing some 400 editors from newspapers, large and small, across the Nation.

Our organization urges you to adopt the strongest possible legislation which will guarantee the free flow of information to the public, unhampered by an unbridled subpena power. We support strong shield legislation at both the Federal and State levels.

I think you are well aware, since the *Branzburg* and *Pappas* cases, some state courts have seized on that decision and used it to intimidate and harass newsmen. Four newsmen have gone to jail for varying periods of time, for refusing to divulge their confidential sources or give up unpublished information. The times ranged from several hours to 45 days.

In none of the cases did the jailing of a reporter further the administration of justice. In none of the cases were the rights of any defendant made more secure because a newsman was jailed. In none of the cases was crime or corruption uncovered because a newsman was put behind bars.

In none of the cases was the public's right to know advanced.

To the contrary. The public's right to know was seriously eroded.

It is clear that we need a law to protect the public's right to know and to maintain a free flow of information to that public.

To provide that protection and to maintain that flow, I think we must do four things:

(1) Newsmen must be shielded from harassment and intimidation by government, including law enforcement agencies, government bureaucrats, the courts, and grand juries.

(2) Government must be prevented from using newsmen as its investigative arm.

(3) Confidential sources must be protected against disclosure or those sources will disappear, dry up.

(4) The media must be protected against becoming the government's public relations firm. It must not be forced into playing the role of yes-man to any administration. The drafters of the Constitution saw an independent and free press as a bulwark of a democratic society, a watchdog of government. As one of my colleagues put it, this is no time in history for the courts to slip a tranquilizer to an alert watchdog.

Corruption, bureaucratic stupidity, and malfeasance in office cannot be uncovered by a press made timid by threat of jail or a broadcast industry made gun-shy because of threats to their licenses.

Guidelines are not the answer. The Justice Department argues that there is no reason to adopt shield laws because it has not abused its subpena powers under the guidelines adopted in 1970.

I admit that I can cite no specific abuses.

However, the guidelines were found necessary because there were abuses of the subpena power prior to 1970. My committee is currently conducting a study in all States to show precisely as possible how many subpenas have been issued since 1967, why they were issued, and what was the outcome of the action. When the study is completed, I will furnish the committee with the results. The partial survey we have now indicates 24 subpenas have been issued for newsmen or reporters. The number of subpenas is going to be larger than 24.

Guidelines provide little protection for the public's right to know.

The guidelines can be revoked at the whim of a President or an Attorney General. The guidelines can be changed overnight. And the Federal guidelines have a closing paragraph which says, in effect, that the guidelines go out the window when the Attorney General feels so inclined.

State guidelines would be no more effective.

We must have a statute. That statute should protect the free flow of information in the states as well as at the Federal level. We, in the APME, are seeking shield laws in all states.

As I indicated earlier, APME supports the strongest possible legislation. Passage of an absolute bill is seen by many in our organization as essential. However, I do not believe as some newsmen do that only an absolute bill will suffice. It is ridiculous to hold that no law is better than a good qualified shield law. A tight, qualified law can eliminate most of the harassing, intimidation-type subpenas that plague the press today. A measure such as that introduced by Senator Walter Mondale of Minnesota is an acceptable qualified bill in my judgment.

Senator TUNNEY. You said that right at the right time.

Mr. FINNEGAN. We believe that those entitled to the testimonial privilege should be not only professional newsmen employed on a regular basis by the so-called legitimate press but also those who engage in free lance work, work for college or underground papers and book authors. We prefer to see a broad definition of "newsman" other than a limited one. The type of information we seek to provide the reader, the listener and the viewer is not always uncovered by the "legitimate" press.

I recognize that drafting shield legislation is a difficult task. But it is an essential one if we are to protect fully the public's right to know and to maintain a free and independent press.

Thank you.

Senator TUNNEY. The committee is delighted to have Senator Mondale with us.

Senator Mondale, do you have anything you would like to say?

Senator MONDALE. As usual, I am late. I came to introduce John Finnegan, whom I regard to be one of the outstanding newsmen in our State and the Country, and who has been especially helpful and valuable as this Nation seeks to do something about the crisis of protecting the public's ability to know the true facts, which bear upon governmental policy.

As chairman of the Associated Press Managing Editors Association, he has been actively involved since the Branzburg situation. He has been actively involved in trying to shape the contours of such legislation. I think the proposals that have come from him are slowly emerging as the consensus position here.

You can recall the first day when we started these hearings. We had the absolute protection proposals. Then we had proposals which did not include state and local tribunals which were very loose and with vague language. I think slowly the consensus is moving toward a very tightly drawn but qualified protection bill which applies to Federal and local tribunals.

Senator TUNNEY. Like your bill?

Senator MONDALE. Exactly. It is really the Finnegan bill which is why I am here.

There is much more than that I can say about him, but I think his testimony reflects the seriousness and the sense and responsibility that he has applied to this very critical task. Every day, if I heard television last night, the President now says the Executive protection applies to current employees of his staff. I think wherever we look we see this public and private effort to deny the American public the real information, embarrassing information, that no politician likes to read about himself but which is essential if we are to have a democracy. Whether we like it or not, most of that information comes about through what is called a leak—and through the hard work of enterprising reporters who rely upon the information gathered from people whose careers are jeopardized if their true sources are known. That has been true from the beginning of this country but even more so as we become larger and more complicated and as the techniques for using the massive power of the Executive to influence and direct public attention and interest exists. It becomes apparent.

I think we need to be almost obsessive, preoccupied with the objective of protecting newsmen and their sources.

Senator TUNNEY. Thank you very much, Senator Mondale.

I recall you testified before the subcommittee and you gave a most articulate statement of your philosophy and belief in this area. I was impressed by what you said.

Interestingly enough, just a personal observation, I have found in the course of these hearings, I have moved in the direction of an absolute privilege, but with a careful circumscription of the definition of newsmen. I don't think that, for instance, politicians with press releases ought to be considered newsmen. I haven't decided myself, what I think that definition should be, but I think it is very critical in developing legislation. I don't know if we can get a consensus.

You hear the dialog we had a little bit earlier with Paul Branzburg and the questions that were asked by counsel with respect to the exception in the Ervin bill, a crime that is witnessed. What are your thoughts on that.

Mr. FINNEGAN. I think it depends on the crime. He makes a very valid point in terms of drugs and crime, disturbances, dissident groups groups. I think when we get into capital crimes of kidnapping or murder, then I think perhaps that kind of exception would be desirable, but I do believe he is correct that the other kinds of crimes that you are talking about, in this case witnessing the manufacture of hashish, that that is a different kind of thing and it would, indeed, stifle the kind of reporting that he so eloquently described.

Senator TUNNEY. Of course, John, we have to define the crimes.

Mr. FINNEGAN. You have a very difficult time doing that, trying to define what kinds of crimes would be accepted.

Senator TUNNEY. The thing is, I think, every one of us feels a reporter who sees a crime, any kind of crime being committed ought to testify.

Mr. FINNEGAN. I would think he would write a story about it.

My contention is that it is very difficult to determine when a reporter stops working. Most of us work 24 hours a day at our jobs. If I am out walking my dog, which is the case often cited, if I witnessed a crime at that point, would I be covered or not? I witness a news story occurring. In my judgment, I would immediately become a reporter a newsman. I would call the desk and report that incident to the desk.

It gets very difficult to attempt to determine when are you not a newsman. I think a good newsman is a newsman 24 hours a day.

Senator TUNNEY. Do you have any recommendations as to the definition of a reporter or newsman?

Mr. FINNEGAN. I think the definition that I believe I read in the recent Cranston bill, the bills are amended so often lately, it is so difficult to keep up with them, I think would be satisfactory with me. It does define a freelancer in more specific terms. He has to be a regular, I believe, periodical contributor. This eliminates the man who says he is a freelancer for a newspaper, when he is only trying to evade testifying.

Senator TUNNEY. Well, I appreciate very much your testimony and I express our appreciation to Senator Mondale.

Mr. Finnegan. I have a couple of observations I would like to make on the Ervin bill. Senator Ervin identifies a newsman as "regularly engaged" as a newsman. What does that mean, and I think it leaves fairly broad. His bill talks about a newsman, meaning an individual. I am not sure whether an individual means reporters only or editors, publishers or anyone who is connected with the business.

I do have some problem with the in-camera setting, also. It has been criticized by several other witnesses, also. The determination as to whether or not the subpena will be quashed or the disclosure made is held in camera. I think that does destroy a reporter's credibility, whether or not he discloses.

Senator **Tunney.** Thank you very much.

The committee will now recess until 10 a.m., tomorrow morning when we will reconvene in room 1202.

[Whereupon, the committee adjourned at 1:48 p.m., to reconvene at 10:00 a.m., Wednesday, March 14, 1973, in room 1202.]

NEWSMEN'S PRIVILEGE HEARINGS

WEDNESDAY, MARCH 14, 1973

U.S. Senate,
Subcommittee on Constitutional Rights
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 1202, Dirksen Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senators Ervin (presiding), Gurney, and Hruska.

Also present: Lawrence M. Baskir, chief counsel and staff director; and Britt Snider, counsel for the subcommittee.

Senator Ervin. The subcommittee will come to order.

Counsel will call the first witness.

Mr. Baskir. Mr. Chairman, our first witness is Mr. Martin F. Richman, chairman, Committee on Legislation of the Association of the Bar of the City of New York.

Senator Ervin. I want to welcome you to our committee and thank you for your willingness to come and give us the benefit of your views on this important matter.

STATEMENT OF MARTIN F. RICHMAN, CHAIRMAN, COMMITTEE ON FEDERAL LEGISLATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ACCOMPANIED BY BENNO C. SCHMIDT, JR., A MEMBER OF THE FEDERAL LEGISLATION COMMITTEE

Mr. Richman. Thank you.

I am Martin F. Richman, the chairman of the Committee on Federal Legislation of the Association of the Bar of the City of New York. With me is Professor Benno Schmidt, Jr., of the Columbia University Law School, who is a member of our committee.

In view of the late stage of the hearings, the subcommittee having heard all the arguments, I am sure, on all sides of the question by now and having developed its thinking on the subject, we will be very brief.

We have submitted our report, Journalists' Privilege Legislation, which discusses the matter in some detail, and I believe the committee has copies of the report.

Senator Ervin. Yes. Let the record show that we will print the entire report of the committee in the record.

[The document referred to is printed in the appendix.]

Mr. Richman. We would appreciate that, sir.

Today we will briefly outline the conclusions that we have reached as to the scope of and limitations on this type of legislation, and we will try to point out, with respect to two of the most recent bills on the subject—the chairman's recently introduced S. 1128 and the latest version of S. 158 as introduced by Senator Cranston and Senator Kennedy—we will try to point out the areas where those bills are parallel to or diverge from the measure we are urging. I will touch upon the basic scope and some of the limitations that we think should be in the legislation, and Professor Schmidt will talk about the constitutional issues with respect to power to legislate, and the matter of who is to be covered as a newsman and the work product aspect of the two bills I mentioned.

Our committee's report stresses that the key to newsmen's privilege is the protection of confidential source relationships, because the use of such relationships is important to carry out the basic first amendment value of promoting free flow of information to the public. Particularly in the area of governmental affairs—corruption, mismanagement, secrecy, coverup, all of those aspects of public life which result in situations in which the public is not getting full information—it can only get that information through the press. In turn the press can only get that kind of information by dealing with individuals on a basis of confidence, confidence that their identity will not be disclosed, confidence that information that is not in fact published will not be disclosed.

Thus, in our view we would not extend the privilege to bar compulsory testimony as to eyewitness testimony on the events that occurred in public. But we would have the privilege reach a situation where the reporter had gained access to a location through a confidential source relationship, where he has observed conduct in a situation into which he could not get but for an invitation that was extended to him on the basis that the location, the source, the details would be maintained in confidence.

Now, in that respect the Ervin bill, S. 1128, seems to diverge from our views because it takes the position that eyewitness testimony should not be protected. We are concerned about that in the situation where a reported has gotten access to information on a confidential basis. While we recognize it is difficult to legislate that a person who has witnessed a crime should not be compelled to testify to it, we regret the broad exception troubles us because in most of the situations we are trying to protect in connection with this privilege there is going to be some element of a continuing crime.

For example, if you are dealing with someone in government who is leaking information to a reporter he may well be improperly in possession of documents.

Senator Gurney. I don't understand your argument on public events. Could you explain that a little further by an example, sir?

Mr. Richman. Yes. It seems to us that if a reporter is present, for example, at a demonstration that is taking place in public streets and he has seen an act of violence, either an act of violence by a demonstrator or a policeman beating on a demonstrator, that he has not gathered that information on the basis of a confidential relationship. It was going on in plain sight and he got that information the same way as any other eyewitness who would be standing there. Therefore, we don't see that kind of testimony coming within the concept of confidential relationship, and therefore that it should necessarily be protected.

5

Now, I am not suggesting that we feel that reporter should willy-nilly be called as witnesses even in that kind of case, but if a showing were made that there was no other source of information that was vital to a particular investigation or trial, we would not exclude that kind of testimony.

Senator GURNEY. I understand. I thought you said the opposite. That is why I was confused.

Mr. RICHMAN. I distinguish that from the case where a reporter is invited to a certain location and there is a pot party going on, or the printing of counterfeit money is going on, and he is seeing the crime before his very eyes, but is there on the basis of confidential relationship. There we would have the privilege reply.

One other difference from the Ervin bill, and I think in view is parallel to the Cranston view in this respect, is that we would not extend the privilege to bar calling a reporter to verify actually published information. I think that is a rather narrow exception, but there may be circumstances where it is appropriate in a proceeding to have the reporter verify that the information that appears in a newspaper is indeed what he wrote. This must be a guarded exception, so it doesn't open the door to testimony about further details that were not included in the publication itself.

Senator GURNEY. Could you give an example there?

Mr. RICHMAN. In some cases the facts in the news story may be called into issue in a trial and the introduction of the newspaper itself might be barred on a hearsay basis, if the question was did "X" see so and so happen as described in the story. I think it would be legitimate to call the reporter, but again only if other sources were not available and it was vital to the case. We would not have an absolute privilege, but would allow calling in the reporter to testify yes, I was there and I saw what I said in the newspaper.

Senator GURNEY. Thank you.

Mr. RICHMAN. The area where we differ from the two pending bills is that we believe it would not be unreasonable to put into the legislation a limited list of crimes which would be exceptions to the privilege. However, we would not favor a subjective test of importance, whereby the importance to the tribunal of the information would be weighed as against the privilege. I am afraid it is human nature that the tribunal is always going to feel that its inquiry is more important than the nondisclosure interests that are being asserted by the press, whether it is a legislative committee or a court hearing a case or supervising a grand jury. It is going to tend to prefer its inquiry, and therefore a subjective test, as other witnesses have said to the subcommittee, would be very undesirable.

But we think it would be reasonable to have a limited list of crimes, those involving serious risk of injury to human life, as exceptions—the kidnapping and skyjacking kind of thing. I would caution that certainly such a list would have to be limited very severely to avoid eroding the privilege completely. It is not a question of setting up judgment that these crimes are important, these other crimes are not important. It is not that kind of a judgment, but a judgment as to the nearness or the distance of a particular subject matter from that core value that we are trying to protect and enhance, namely, getting out to the public the fullest information on governmental affairs, governmental management, that we possibly can.

I don't think the list of crimes is essential to our position. I think we would prefer legislation that had no such list of exceptions to no legislation, and certainly we would much prefer legislation without this type of exception to legislation that had a very broad-scale list of exceptions that would obfuscate the privilege.

One area that presents a troublesome conflict of values is that of actual criminal trials. When you get to the trial stage in a criminal case, on the one side you have the defendant who is seeking to defend himself, to avoid imprisonment and trying to establish his innocence. He has the sixth amendment right to obtain testimony on his behalf. I think we have to be cautious about completely precluding the defendent in that situation from having access to exculpatory information that may be available to the press.

On the other hand, the prosecution also has a perfectly legitimate concern about getting the facts in that situation. In balancing out the first amendment values against the fair trial values, it seems to us that legislation could recognize both values and allow a carefully guarded ability of a trial judge to call for information from the press in the context of a criminal trial.

Senator ERVIN. You mean a discretionary power on the part of the judge?

Mr. RICHMAN. It would necessarily have to be discretionary or based on a showing of a particularly strong need. It would probably call for a preliminary inquiry in-camera. There are precedents for this in connection with attempts to disclose State secrets, for example, in trial context. We refer to cases in our report on the bottom of page 18, *United States* v. *Reynolds*, and the recent case of *Environmental Protection Agency* v. *Mink*.

In the area of civil cases——

Senator GURNEY. Let's probe that just a little more.

As I understood, you said both the prosecution and the defense interests ought to be weighed. Let's take an example. Suppose you had a case where it was vital for the success of the defense to get a piece of information from a reporter that normally would be subject to a shield law. I take it in that case you would apply your suggestion here. Now, then let's go to the other case. Suppose it were just as crucial to the prosecution to obtain the evidence from an eyewitness member of the press in order to successfully prosecute; would you recommend the same decision in that case?

Mr. RICHMAN. We think it would be reasonable to have that exception apply on both sides in the context of the actual criminal trial where the prosecutor has a very heavy burden of proof, prove him guilty beyond a reasonable doubt, and the defense has on a constitutional basis the need to be able to get all of the evidence that exists.

Senator ERVIN. I have difficulty with leaving great latitude to a judge's rule on admissibility of evidence. It is bad to have a system where one judge exercises rules of evidence either to convict or acquit a man and have another man tried for the same offense convicted by another judge who rules exactly the opposite. It destroys equality before the law, in my judgment.

Mr. RICHMAN. Unless the standards were carefully defined, carefully hedged in, it would be a great danger.

Finally, I just mention that we do not think that the privilege should be lifted in civil cases for the purpose of assisting litigants with the one exception of a defamation case where the defendant is in effect relying on the source to prove a defense of truth or to prove a defense of good faith. There we think it is unfair to the trial in that case to allow that assertion of reliance on the source to be made by one side without giving the other side the opportunity to inquire into the facts; for example, the fact of whether there actually is a confidential source that is the basis for the news report.

I will now turn to Professor Schmidt to continue the outline of our views on the constitutional issues.

Mr. SCHMIDT. Mr. Chairman, I would like to speak briefly to two constitutional questions with respect to Congress' power to legislate a journalist's privilege, and then I want to turn to two substantial questions of policy, first, who ought to be covered by shield law; and second, whether legislation ought to protect journalists' work product from subpenas duces tecum that seek production of his notes or film or whatever.

The two constitutional questions that arise, it seems to me, are, one, whether Congress has power to legislate newsmen's privilege that would be binding against the states as well as against the Federal Government; second, whether any constitutional provisions, whether the first amendment or the fifth amendment, impose definitional requirements on Congress that would stand in the way of drawing necessary lines and classifying persons as either protected or not protected.

First, I have read with interest accounts of the chairman's view that Congress does have power under the commerce clause, I take it, and perhaps as well under the 14th amendment, to legislate a journalist's privilege that would be applicable to the states as well as the Federal Government. That is the view of the association of the bar as well. We have discussed in our report our reasons for believing that Congress has a clear constitutional power to legislate effectively against state investigative procedures as well as against Federal procedures. Our view is that the chairman's understanding of Congress' constitutional power is correct.

Senator ERVIN. I will have to confess that I had the opposite view at first because I have a natural reluctance to having the Federal Government establish what in effect is rules of evidence for state courts. The fact that the dissemination of news is one of the biggest interstate businesses in this country, plus the fact that the first amendment guarantees the right of the people to know convinces me to agree with your position.

Mr. SCHMIDT. Well, Mr. Chairman, I think your reluctance is well justified as a general policy matter. Congress ought not to legislate in a way that interferes with the states unless it concludes that such legislation is necessary in order to protect the flow of information to the public.

Our view on that question of policy is that there is greater need at the present time for protection against state interference with journalist's confidential sources, than there is the Federal level. The Attorney General's guidelines, which have now been in effect for a couple of years at the federal level, have been administered, as I understand it, with reasonable sensitivity to the needs of the press. Now those guidelines, of course, can change, a shield law would serve useful purposes at the Federal level of giving newsmen security that they could protect their confidential sources. But almost all recent instances where journalists have been threatened or actually held in contempt have involved State investigative procedures.

So I believe this is an instance where the national interest in news which flows across state lines ought to be protected by Congress against local burdens and impediments to that flow.

Mr. Chairman, the second constitutional problem that some people have difficulty with in connection with shield laws is whether or not Congress can classify only a certain group of people as protected by legislation. Now, a problem there arises because the first amendment is not the protection solely for newsmen. It protects all of our rights to speak, whether we are newsmen by vocation or soapbox speakers or whoever we may be. Clearly, the Supreme Court in the *Caldwell* case was troubled by the problem of limiting the principle of protection of confidential sources only to newsmen.

But the Court has always realized that legislation proceeds on different bases than judicial decisionmaking. The courts have recognized that Congress, particularly when it moves into a new area for the first time and enacts a reform measure, can proceed one step at a time—take the problem on piecemeal as it were and deal with it where the need is felt to be greatest—and save for another day the question whether a privilege enacted ought to be extended to the full logical coverage of protecting everyone who might make some plausible claim to it.

So I believe as a constitutional matter that Congress has power to limit protection of confidential sources, to a carefully defined group of people who can prove an ongoing regular occupational connection with the news media. In sum, I think, Congress is free under the Constitution, both with respect to whether any law could apply to the States and with respect to who as a matter of sound policy ought to be covered by a satutory privilege.

If I may turn to two of the difficult policy problems that this legislation raises. One is who ought to be covered by the kind of statutory protection that Mr. Richman has outlined; and, secondly, whether journalists' physical work product ought to be protected.

Mr. Chairman, I noticed that your bill, S. 1128, would define as a newsman anyone who is regularly engaged in the occupation of collecting information for dissemination to the public by any means of communication.

Now, I take it that definition would protect anyone who could come forward with a claim that he or she was engaged in collecting information for dissemination to any kind of media, that is to say your protection would apply to scholars, pamphleteers, lecturers, I suppose, and anyone else engaged in dissemination of information. It would not be limited to professional journalists engaged on a regular basis in publishing news in a periodic medium.

Senator Ervin. That is correct. That is the way I interpret it, because I think he has got to be regularly engaged in the project for dissemination to the public. It doesn't make any difference what category of media he falls into under that bill.

Mr. SCHMIDT. As I understand your bill, it is only the occupation of collecting information that needs to be regular and it is not the dissemination of news. There is no requirement of regularity there. So a scholar who had never yet broken into print, but who was constantly engaged in collecting information would be covered.

I believe the view of the association of the bar is that such broad coverage is not called for at this time. Our view is that the need for protection of confidential sources is greatest with respect to journalists who disseminate it on some regular basis.

Senator ERVIN. Well, I might state that was the view I had originally. This is a very difficult field to draw a bill in. I restricted the coverage to those who engage in the collection of information for the dissemination to the public by means of newspapers, magazines, or broadcasting industry. But then it was pointed out by witnesses that now with the disappearance of journals like *Life* and the *Saturday Evening Post* and many others that used to be pretty close to the newspapers in that they dealt with current things, we now have books written on current things. For example, if President Nixon goes to China, almost the next day somebody writes a book on the subject. So I think books have taken the place of what we used to think of as ordinary newspapers and news journals. I can argue either side as to whether it should be narrow coverage or broad coverage without convincing myself either way.

Mr. SCHMIDT. Mr. Chairman, you are very persuasive. It seems to me, that a plausible case for protection of authors who do not publish regularly can be made.

I suppose our difference is solely one of degree and not at all a difference of principle in any way. The association's view is simply that the public's interest in free flow of information is greatest as to media which are published periodically as compared with books which come out sporadically.

Senator ERVIN. Of course, one of the biggest fights over the whole question was between the House Un-American Activities Committee and the publisher of books a few years ago, Mr. Romney. The congressional committee didn't like Mr. Romney using the book for the purpose of influencing the minds of men. So they tried to make him come in and give the names of everybody who had bought his books in bulk quantity. The Supreme Court had quite a hassel in that case. They decided finally that the act creating the Committee on Un-American Activities wasn't broad enough to give the committee that power. Thus, Justice Frankfurter wrote an opinion based on that ground, but Justice Douglas wrote a very powerful opinion based on constitutional grounds. So people do write books on controversial subjects that are investigated, if not by grand juries, by congressional committees. They are one of the worst offenders in this field.

Mr. SCHMIDT. I think the chairman might well persuade me that books ought to be covered. Our view was that whatever classification is drawn to define the persons protected by legislation ought to be easy to administer. If you have a kind of a broad standard which requires a case-by-case assessment of the facts in a complicated way, there are two dangers to that.

One is that various witnesses may try to impede investigative processes by claiming that they had in mind to publish a book about whatever it is that they are being asked about, and if legislation protects everyone who is gathering information with the thought of writing a book, the courts will be necessarily engaged in very difficult factfinding problems which will turn largely on the credibility of the witness, whether or not he is able to persuade a court that he is telling the truth about his plans to write a book.

Our test on the other hand, would limit the privilege to professional newsmen, easily definable as such by external criteria, such as a current employment relation with a periodic medium or alternatively a record of past publication. We would not require an extensive record, just three or four instances of past publication in a periodic medium. Such a standard would save the court from the necessity of weighing the credibility of a person who claims the privilege.

Now, the cost is, of course, that some people would not be covered by the statute who ought to have protection. We believe that cost is worth paying in order to have a simple and easily administered test which protects the core group in which the public has such an interest in having their confidenitial sources protected.

Senator ERVIN. There are a lot of freelance writers who are not employed by anybody. They go out and conduct an investigation and then they sell their article. Would they be protected?

Mr. SCHMIDT. Only first time freelancers would not be protected. If a freelancer could point to a record of past publication, which we would make a very modest requirement, only three or four instances of past publication, just to establish that he is indeed a writer and not someone who is making up the claim to be a writer in order to serve the purposes of nondisclosure, such a freelancer would be coverd, Mr. Chairman. So it would be only the first time freelancer who had no employment connection with the media who would be excluded from protection under the kind of bill we would recommend.

Mr. Chairman, the second problem I would like to mention briefly is the question whether a statute in this area ought to protect reporters from compulsory disclosure of their notes and tapes and first drafts, films, and whatever other tangible documents they have assembled in the course of their journalistic investigations.

The problem with giving the government power to make a reporter come in with his first drafts and whatnot is a much broader one, in our view, than the confidential-source problem. If the Government can require a reporter to disclose his first draft, we believe the government would tend to use that first draft not only for legitimate investigative purposes, but to second-guess the reporter's editing and how he covered the final story. A reporter's first draft may well represent a slanted view of the story or an incomplete view of the story. A reporter may want simply to write up a story one way and see how it looks before he balances the story with other material. If his first casual effort at building a story is to be subject to subpena, we are fearful that the editorial process will be impeded. The reporter will be constrained about what he puts into a first draft if he fears has has to justify his final story in terms of the first draft and justify the editorial decisions that were made.

Mr. Chairman, unless reporters can claim protection for their work product we will have a series of instances such as arose in connection with the "Selling of the Pentagon" documentary. Quite apart from, and whether that documentary was a well-done job or slanted job, compulsory production of first drafts, or in that case CBS's original outtakes, puts the Government into the editorial process in a way that we believe the first amendment was designed to prevent.

Protection of work product, in other words, rests on a different value. It is not so much a matter of a reporter's sources drying up, as with confidential sources, but rather keeping the Government out of the editorial process and protecting journalists from having to justify their editorial decisions before Government bodies.

So we would concur with the protection which your bill gives to the work product as well as to reporters' confidential sources, and Senator Cranston's bill, if I understand it, would also give the same sort of protection to work product.

I just wanted to make clear our view that the justification for protecting work product is different from the justification for protecting a reporter's confidential sources.

Mr. Chairman, that concludes the summary of these points which are developed greater depth in our report, which we have submitted for the record, and I am sure Mr. Richman and I would be delighted to try to answer any questions that you have.

Senator ERVIN. I would like to say I agree with your views as you have expressed them with respect to the constitutional powers of Congress to enact a newsman's shield law. I also agree with the need for such a law to apply to the States. That is where the worst offenses occur.

Also, I agree with you that Congress has the right to make a reasonable classification as to who should be covered by the law and who should be excluded.

One great trouble about legislation is a pragmatic one. That is, the fact that before Congress can make an effective law, you have got to get a majority of 100 Senators to vote for it and the majority of 435 Congressmen to approve it. Then you have to get the man on the other end of Pennsylvania Avenue to sign it.

There is a great deal of wisdom in what Mr. Richman said, in my judgment, about testifying to crimes. The trouble is you would probably have a great difference of opinion among 535 Senators and Congressmen as to what crimes ought to be classified. For example, you suggest they ought to be crimes of violence which threaten life or limb. Well, in my view a peddler of heroin is worse than a murderer because he virtually destroys a man's soul and renders his life rather useless. We would get into a lot of hassles on what crimes should be included and which crimes should be excluded. We might have a difference of opinion between 535 Congressmen and Senators. This is the most difficult field I have ever tried to write a bill in since I have been in Congress. There are so many things to be said as to who should be covered, who should be excluded and the nature of the privilege; whether absolute or qualified.

I introduced two bills before my last one, and I hadn't more than got them complete and introduced then I became dissatisfied with the features of them. I decided as a pramatic matter that I better get a bill that is as simple as possible and as understandable as possible, and I better give an absolute privilege in a narrow area. If you put too many exceptions in it, the first thing the exceptions swallow is the rule.

So my bill leaves about everything to the law of evidence, as it now exists except two matters. One is the disclosure of the identity of a confidential source of information where they have been given in confidence. I will not only protect the newsmen who gathers it, but also protect his custodians, as we had in the case of the Pentagon where the head of the Washington Bureau of the *Los Angeles Times*, rather than a newsman, had possession of some tapes and he was about to go to jail on account of them.

I put in the fact that this should not excuse a newsman from testifying to the identity of people who committed crimes in his presence. I think that is essential to get a bill through Congress. I don't think the majority of Congress will ever vote to say the newsman should not be compelled to testify just like everybody else to a crime he sees committed even though he comes in, as in the *Branzburg* case, and gets the opportunity to see the crime committed only because of confidential relationships between him and his sources. I would put it like this: If anybody invites a newsman in to see him commit a crime, I don't think he ought to be exempted from prosecution. However, a jury might acquit him on the grounds that anybody who would do that is insane.

The only thing that troubles me is we have an old adage: "Too many cooks spoil the broth." We have a lot of different opinions of what ought to be in it and what should not be in it. I think that endangers the bill.

Mr. RICHMAN. Mr. Chairman, I certainly sympathize with your concern about getting a consensus on a difficult subject like this. I might say that while we may differ in some details in our report, the basic thrust of the principles you have just stated, which I think are carried out in the Cranston bill as well, would find our support.

The only point on which we would express ourselves at being trobled is this matter of the newsman having been eyewitness to a crime in his presence, because that can open up the very breadth that you were concerned about in connection with the list of exceptive crimes. So many things can be either a crime or an element of a crime. We would be concerned about that exception if it reaches to situations, away from the public area, away from events that occur in public, and gets to the Branzburg-type case or gets to the case of a newsman who is talking with a Government employee who is violating a law in bringing out of the files a piece of paper, for example. I believe that in the Ellsberg trial in Los Angeles, one of the charges is that of possession of stolen property. That well might be the case with a Government employee who brings out a document and shows it to a reporter, gives it to the reporter. If the exception went that far I think it would undercut the basic principles that you have expressed, and for that reason we would write it as an exception only as to eye witness testimony concerning events that occurred in public or in a context where the newsman was not brought to the place under a pledge of confidentiality. I think that is the only serious difference that we have with you.

I might say that the matter of procedures is something we did not go into in our report, but those in the bills to which we refer this morning, appear very constructive in having a dual procedure. They authorize the assertion of the privilege either in the ordinary procedure of a particular tribunal or by a procedure they provide for a presubpena review. That is so important in the context of what Earl Caldwell was talking about, that being called into a secret session like a grand jury would itself discredit him with his sources, and prejudice his ability to get information from his sources, because they couldn't know whether he had or had not testified.

Senator ERVIN. Yes.

Mr. RICHMAN. One thing that troubles me in the Cranston bill, as a lawyer, is section 5(a) of that bill, which says that a finding in the preliminary proceeding, the presubpena proceeding, would not be binding if the claim of privilege was renewed subsequently after the reporter was called to testify. It troubles me to have a situation where you would have to litigate the same issue twice. If the first proceeding actually went to the merits and tried out the facts and findings were made that the privilege did not apply in accordance with the standards of the legislation as enacted, it would seem to me reasonable that that should conclude the matter. On the other hand, I can appreciate the point that if the first proceeding is preliminary, goes only to whether there is a modicum of a showing and defers to the later time the ultimate question of the merits, then of course it should not be conclusive against raising the issue at a later date.

Senator ERVIN. We have one bill here which has many fine features to it, the Eagleton bill, but it provides in effect you can't get a subpena for a newsman at all unless you first have it passed on by the court. I think in that situation, a newsman who wouldn't want to reveal his sources could head to the tall timbers. In the second place, I know as one who has practiced law a great deal, that sometimes you don't discover the identity of a witness or the necessity of subpoenaing a witness until you have been in the progress of a trial for maybe several days. It would be rather cumbersome to have to stop the trial. So I provide this method of allowing the person to raise it just like any other privilege—by objection at the time the question is sought. It is a simple procedure.

Also, I recognize there is more danger of a newsman being, in effect, legally mistreated by a grand jury because the grand jury has no law except the district attorney. If he is any good as a district attorney, he is likely to be a little prejudiced on the side of the prosecution. The grand jury is composed of laymen ordinarily. So that is the reason I have the special provision that a newsman shall not be required to testify or produce documents until there has been a review of the grand jury's ruling by the judge presiding in the court where the grand jury is sitting.

I think it is necessary to have some practical, pragmatic proceedings to safeguard this right. I am more satisfied with that provision of the bill than any of the other provisions.

Senator GURNEY. Well, first of all, gentlemen, I want to thank you both for the very interesting and enlightening discourse on this troublesome question.

Let me ask one general question here, if I may.

As you know, we have had bills and testimony which suggest that we should pass an absolute shield law or one with many exceptions. Is it your opinion that a bill with many exceptions would probably be declared unconstitutional under the first amendment as an abridgment of the freedom of the press?

Mr. SCHMIDT. No, Senator Gurney, I do not believe—I think Congress would have to do something quite arbitrary in this area before the court could step in and declare a statute unconstitutional. I think Congress has a very large amount of flexibility in legislating and that I would be quite surprised if the courts were to strike down any reasonable classifications or any reasonable exceptions in a statute.

Senator GURNEY. What would you base that opinion on?

Mr. SCHMIDT. Well, I would base it first on the fact that the court has now held that there is no general first amendment right to protect confidential sources in the face of compelled disclosure before a grand jury.

Senator GURNEY. Of course, this involved only one case, and I think there have been, one or two other cases that have arisen in the lower courts to put some limits on this very broad decision.

Mr. SCHMIDT. Yes, sir, in a couple of civil cases that I know of in which a reporter was subpenaed to testify on behalf of a civil litigant, the court upheld the reporter's privilege not to testify on first amendment grounds.

I myself would not regard those decisions as freezing the law of the first amendment in this area. I think what the courts are saying is that they cannot see a justification for a general privilege, and that while there may be instances here or there where they would uphold the privilege, the courts obviously regard this problem as one of balancing two very valuable interests. Since the courts obviously see this issue as a very close one, I believe the court would grant a very large degree of deference to Congress' policy judgments in passing legislation. So my belief is that Congress would be well advised to concentrate on the policy questions presented without worrying too much about the courts striking down any statute which results. I think the courts will look to Congress very much in this area as the source of wisdom about what proper policy ought to be in balancing these difficult—precisely because it is such a difficult problem, I think, the courts would defer to a very large extent.

Senator GURNEY. I haven't had time to read your brief here. Does it include the case law to substantiate your argument?

Mr. SCHMIDT. Yes, Senator, we do include some discussion of the cases which stand for the proposition that Congress can, as some courts have put it, proceed in a piecemeal fashion in dealing with a problem like this hitting the problem where it seems to be in most need of attention and not necessarily legislating across the board to deal with every conceivable aspect of the problem that might plausibly require legislation.

I, myself, don't have any substantial doubt that these cases are justifiable and stand for the proposition that where Congress is legislating with respect to a problem for the first time, the courts understand the need of the legislative process to be somewhat experimental, saving for a later day the question of whether or not some protection ought to be extended to the full sort of logical reach that it might ultimately have.

Mr. RICHMAN. I might add that the legislation would not and should not preclude further development of the constitutional law on the subject in the cases. The legislation would establish the minimum protection which the Congress would be asserting as necessary to assure a free flow of information, but this would not preclude the courts from developing a higher level of protection based directly on the first amendment in appropriate circumstances. For example, as in the civil cases that have already occurred since the *Caldwell* case. Even in the criminal area the concurring opinion of Mr. Justice Powell, and even the majority opinion, suggests that under other circumstances the court might find a limited first amendment protection. The work product area has not been fully litigated, and it does seem to us that that is a very fertile field for direct first amendment protection. Such case law development could continue somewhat independently of the legislation, but it might be prudent for the legislative history or perhaps even the text of the statute to indicate, as I believe has been done in some of the criminal procedure enactments of recent years, that this statute is not intended to put a lid on what the Constitution requires, but only is intended to put a floor under the amount of protection.

Senator Ervin's bill does just that in relation to the development of state law. It provides that the preemption is not absolute so that state law giving greater protection can be enacted and developed independently of the federal statute, and of course the development of constitutional law should likewise proceed in the courts.

Senator GURNEY. I think you have probably answered the next question I was going to ask, and that had to do with your suggested exceptions. Are they really not to make the shield law constitutional, but because you feel these particular exceptions should be there?

Mr. RICHMAN. Yes, and I am tentative about it because, as the Chairman indicated, one man's list of exceptions may be inadequate to someone else. Certainly, our strongest feeling is that the exception list should not be allowed to grow so broad that it eats away the basic purpose of the statute. We don't think that the exceptions are necessary to give the bill constitutional validity, and I think our position on the exceptions is looking in the direction of trimming them down rather than expanding them, even to the point of not having that kind of list of exceptions. As indicated in our printed report, one member of the committee dissented in part on the basis that there should not be these exceptions.

Senator GURNEY. Thank you.

Senator ERVIN. I took some encouragement about this matter from the fact that it was stated in the *Branzburg* case that Congress could establish a privilege, either broad or narrow, as it thought was necessary. I further took some encouragement out of the fact that the *Branzburg* case, unlike the *Caldwell* case, came up from the state court while the other came up from a Federal court.

I want to thank both you gentlemen for making some very helpful and some very constructive suggestions. I also thank your committee for the work they have done in this field.

Mr. RICHMAN. Thank you, sir.

Mr. SCHMIDT. Thank you, Mr. Chairman.

Mr. BASKIR. Mr. Chairman, our next witness is Dr. Hans J. Morgenthau, professor, City College of New York.

Senator ERVIN. I want to welcome you to the subcommittee and express our deep gratitude to you for your willingness to come and give us the benefit of your views in what I consider to be a very important issue.

STATEMENT OF DR. HANS J. MORGENTHAU, PROFESSOR, CITY COLLEGE OF NEW YORK

Mr. MORGENTHAU. I shall limit my testimony to two propositions: First, that the privilege of confidentiality be applied to scholars dealing with contemporary issues; and, second, that the extension of this privilege is not for the convenience of the scholar, but is essential for the vitality and proper operations of the democratic process in America.

The position of the scholar dealing with contemporary issues is analogous to that of the journalist in that both must rely upon confidential sources for the gathering of facts. An economist who investigates the pricing practices of a particular branch of industry or of a particular corporation has to rely at least for some of his empirical data upon confidential sources in industry or corporations. The natural scientist who wants to assess the effectiveness of a particular government-sponsored program, say, in the fields of nuclear energy or weapons systems, could not perform his function without having access to confidential information. The political scientist who would want to probe into the validity and background of a particular policy would be in the same position. For instance, the scholar who has concluded on the basis of his understanding of history and of his general knowledge of political and military theory that a particular war cannot be won with the means employed will find his arguments greatly enriched and his confidence in the soundness of his judgment considerably strengthened if he has access to government sources supplying him with empirical data that support his judgment. To refer to my personal experience, I would not have dared to pit my own judgment about the Vietnam war against that of the Government and the prevailing public and scholarly opinion had I not received confidential information, sometimes from highly placed sources, that bore out my judgment.

While the access to confidential sources of information is equally indispensable for the journalist and the scholar, their purposes are obviously different. The journalist gathers news for their own sake, and only a small minority of journalists will occasionally or regularly analyze them in the light of theoretical or practical considerations. For the scholar, on the other hand, facts are a means to the end of theoretical analysis. That analysis will give the scholar an insight into the operations and philosophy of Government which he can then judge in the light of certain theoretical and practical propositions of his own. It is at this point that journalist and scholar meet again in the performance of a function without which democracy in America will lose its vitality and is likely to wither away in the end.

Democracy is predicated upon a pluralism of persons, political philosophies, and policies, vying for political power. That democratic competition, in turn, presupposes the at least approximately equal access to the facts and the mass media forming public opinion. In this respect, the Government inevitably enjoys an enormous advantage due to the centralized character of the modern technologies of communication and to its ability to operate in large measure in secret. Parliamentary system of Government can in part compensate for this advantage by compelling the Government to account for its actions, by forcing the Government into the open through the presentation of alternative policies, and by threatening the Government with the loss of its parliamentary majority. No such corrective exists in the political system of the United States. The functions a clearly defined opposition performs in parliamentary systems are here taken over piecemeal by a multitude of individuals and decentralized agencies within and without the Government. In the United States, it is in this fashion that the actions of the Government are scrutinized and alternative policies to those of the Government are developed.

Journalists and scholars belong to that multitude of pluralist outlets for scrutiny and alternative policies. But within that multitude, they perform a unique and vital function in that they are not only the only ones who are free to reveal what they know and to speak what they think—owing to the first amendment to the Constitution—but that they also have the positive professional duty to do so. Much of the scrutiny of government action and of the opposition to official policies is marred by incompetence and tainted with partisanship. Even more is muted by opportunism, a manifestation of a conformism which de Tocqueville already recognized as a dominant force in American society, and silenced by the severe pressures toward bureaucratic conformity. The ruin of public officials who prematurely opposed the Vietnam war, and of officials of the Defense Department who revealed the squandering of public funds are cases in point. The Government has at its disposal a whole army of scholars, directly and indirectly dependent upon it, who provide the arguments and justification of whatever policy the Government pursues or intends to pursue. Considering the premiums American society puts upon the avoidance of scrutiny and the compliance with official policy, the functions the journalist or the independent scholar perform are not only useful and necessary but vital for American democracy. For they have become the main channels of independent information and judgment from the opposition within the Government to the people at large. Close that outlet and you have taken another step toward an unchecked conformism, an orthodoxy which tolerates but one truth and one reason, however false that truth and however irrational that reason may be proven to be by subsequent events.

The ability of government agencies to compel journalists and scholars to reveal their confidential sources under the threat of legal penalties, especially imprisonment, would indeed effectively close that outlet. For which government official would dare put his position and career in the hands of a journalist or scholar who, however trustworthy, might, or might not, go to jail rather than betray a confidence? And what conscientious journalist or scholar can be so sure of his own steadfastness in the face of such a threat that he would even want to receive such a confidence? Thus the present legal situation, as exemplified by a number of court cases involving journalists and thus for one scholar, if it is not corrected through legislative action, will take us a giant step toward that situation with which totalitarian governments have made us familiar: the official orthodoxy will impose itself unchallenged by contradictory facts and judgments upon an ignorant, hence pliant population. For there is then nobody left, to use a biblical phrase, who can "speak truth to power."

It must be kept in mind that the issue has remained dormant until recently only because the Government has as a matter of course respected the rights of journalists and scholars to the confidentiality of their sources. The effectiveness of the first amendment rights has depended upon the Government's moral restraint from infringing upon these rights or at least from testing how far the courts will allow it to go. What argues for the necessity of legislative protection, making the constitutional one effective, is the distintegration of the Government's respect for first amendment rights and its determination to narrow them as much as the courts will allow it to. High Government officials have repeatedly denied that members of the press are, in Mr. Ehrlichmans' words, "an estate set apart from society, with overriding rights . . . actually they are just like the rest of us. . . ." In other words, the present administration denies journalists and, by implication, scholars as well that vital function of scrutiny and constructive criticism, without which democracy must wither on the vine. It tries to protect its own secrecy by denying the privacy of certain groups of citizens. The legal sanctions against journalists, and thus far one scholar, are the empirical manifestations of that philosophic denial.

This being the climate of opinion, from which the courts are not immune, the proposals for the legislative enactment of a qualified privilege must be considered inadequate. Such enactment would leave it to the courts to decide under what conditions the privilege applies; that is, under what conditions journalists and scholars shall be allowed to scrutinize the actions of the Government and criticize its policies without having to reveal their confidential sources. Yet since the present issue has arisen out of the actions of the courts, confirmed by the Supreme Court, to leave the remedy to the discretion of the courts might affect the legal arguments but not the core of the issues itself. For public officials, on the one hand, and journalists and scholars, on the other, would be effectively deterred from conveying and receiving confidential information if the protection of their relationship were to be left to the uncertain discretion of the courts. The protection of confidential sources must be absolute—only defamatory actions being excluded—or it is not worth having.

Therefore, of the bills and resolutions introduced in the Senate, which have come to my knowledge, I favor Senate Joint Resolution 8, S. 158, and S. 451, provided the activities of scholars are specifically included.

It has been argued that such absolute protection would allow the beneficiary to cover up crimes of which he has been confidentially informed. That argument is valid as far as it goes. But it assumes that the beneficiary, confronted with such a moral dilemma, would automatically opt for shielding the criminal rather than revealing his confidential source. Yet even if this low estimate of the beneficiary's moral values were correct, the possible hypothetical protection of a criminal would be a small price to pay for the preservation of free inquiry as a vital function of a democratic society. Or, to put it the other way around, it would be a suicidal absurdity to jeopardize democracy in America on the off-chance that criminal prosecution might be hampered by the refusal of a journalist or scholar to reveal his confidential sources.

If the Congress were not willing to do more than extend qualified protection, a strong argument could be made in favor of the Congress doing nothing at all. The first amendment declares that "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." Yet Congress, by passing a law extending qualified protection, would indeed abridge the first amendment freedoms as far as the qualification reaches. As things stand now, the journalist or scholar is at the mercy of the courts interpreting the first amendment. What he needs is protection from the courts misinterpreting the first amendment. What he does not need is congressional authorization for the courts to misinterpret the first amendment under certain qualifications.

Thank you very much.

Senator ERVIN. I take it that you believe that any law which Congress might pass in this field, regardless of whether it is narrow in scope or broad in scope, should make the privilege it creates absolute?

Mr. MORGENTHAU. Correct.

Senator ERVIN. And if you make it a qualified privilege, the qualifications of the privilege are likely to destroy the value of the privilege, aren't they?

Mr. MORGENTHAU. Certainly, because the confidential source will think twice before it will put into the hands of the courts—the interpretation of the courts—his reputation as a public official and his career as a—or whoever the individual is.

Senator ERVIN. I think the first amendment is concerned with the communication of ideas, communication of information, and therefore whatever privilege is granted should be as broad as reasonably possible. I came up with a definition in the most recent bill I introduced that gives this privilege to a newsman, who is defined as anyone who is regularly engaged in the collection of information for dissemination to the public by any means of communication. I believe that is broad enough to cover the scholar who collects information with the intent to disseminate it in book form, for example.

Mr. MORGENTHAU. It certainly does. The question is whether a grand jury or court will not interpret the newsman narrowly and will not say this distinguished professor is certainly not a newsman. I would not look at myself or some of my colleagues as newsmen. So whether one should not make it clearer that this does not only concern newsmen, whatever their privileges may be, but also people who are not generally in public called newsmen is an open question.

Senator ERVIN. I believe I used the word "newsmen" as a generic term to cover everybody who is engaged in collecting information with the intent to disseminate to the public whether by radio, newspaper, book, pamphlet or any other means of communication. I have been convinced that the first amendment is concerned with scholarly works as much as anything else. It is necessary for people to know what is going on from day to day, but it is also necessary for people to know, if our government is to function, what are the developments in the field of law or in the field of economics or any other field where human knowledge is essential.

Now, I certainly agree with your observation that the first amendment was not written for the benefit of those who engage in collecting information and disseminating information, but its fundamental purpose was to serve the American people and to make our institutions of government work. In my judgment, our institutions of government would not function properly unless we have the freest collection and dissemination of information.

I am struck by your phrase, that the first amendment—this is not exactly what you said—is designed to allow, the people to speak the truth to power, to governmental power or any other kind of power. That is certainly essential, if our institutions of government are to work and our society is to be a free society. Isn't that correct?

Mr. MORGENTHAU. Yes.

Senator GURNEY. Professor Morgenthau, how would you describe a scholar?

Mr. MORGANTHAU. How would I describe a scholar? It reminds me of the freshman that was asked the question, what is time? He said if you ask me I don't know, if you don't ask me I know.

Senator GURNEY. If we are going to pass a law that shields scholars we have to know what a scholar is.

Mr. MORGENTHAU. Well, a scholar is an individual who professionally deals with theoretical propositions, who develops certain general theoretical propositions on the basis of his empirical knowledge. It would be a rough approximation to what you would call a scholar. I would think if a law were to include explicitly scholarly activities generally understood, it would then be for the courts to decide whether in a particular case this activity claimed to be scholarly in general usage actually is scholarly.

Senator GURNEY. Suppose you had this situation. Suppose you had a couple of large companies competing for a defense contract, a new weapons system, and it looked as though the contract was going to company A. So company B has a scholar in the think factory who gains access to information from company A's files through a crime, papers, and drawings and so forth are turned over to the scholar for company B. Then the scholar for company B writes an article shooting down company A's weapons system; the government backs off and doesn't buy it and buys company B or another one. Would you protect such a scholar?

Mr. MORGENTHAU. Yes, I would protect him——

Senator GURNEY. I mean his sources?

Mr. MORGENTHAU. His sources—I would not try to force him to reveal his sources.

Senator GURNEY. You would what, sir?

Mr. MORGENTHAU. I would not compel him through subpenas to reveal his sources, for this is not industrial experiment, which is something quite different, but this is a legitimate undertaking to find out which weapons system is the best under the conditions and which company is the most qualified to manufacture it. If he comes in the possession of relevant material which has been obtained by criminal activities, I would not force him to reveal his sources.

Senator GURNEY. Professor, that assumes that if he was performing a service to the Government and society by revealing that this weapons system wasn't as good as the other, but let's assume that that wasn't the purpose at all. The purpose was the purpose that I tried to convey: company B wanted to shoot company A out of the saddle and resorted to criminal means to do this; should we protect that kind of exercise?

Mr. MORGENTHAU. Okay. Then he would be liable to criminal penalties under penalty of conspiracy.

He would himself be an element, an actor in a criminal conspiracy, so he would be himself liable to criminal prosecution, which is the case quite different from the one I had in mind.

Senator GURNEY. And your reasoning there would be that the court would determine whether it was a publication, say in the national interest, or for the purposes of sabotage?

Mr. MORGENTHAU. Certainly there would be some evidence available which would show that this so-called scholar has acted in collusion with a competitor to company A and has engaged in a conspiracy.

Let me suppose a foreign power would ask me to oppose a certain policy of our Government and I would get confidential confirmation from within the Government which would support such an activity of mine, obviously I would be liable under the Government statutes myself, and the old problem which we are discussing here would not arise.

Senator GURNEY. Thank you.

Senator ERVIN. Thank you very much. You have given us a very fine exposition of your views and been very helpful to the committee.

Mr. MORGENTHAU. Thank you very much.

Mr. BASKIR. Mr. Chairman, our next witness this morning is Mr. Evans Witt, editor, the *Daily Tar Heel*, University of North Carolina.

Senator ERVIN. I want to welcome you.

I would have been editor of the *Daily Tar Heel*, but I made a mistake. They had about 16 of us in nomination for the post of editor of the *Tar Heel*, and in those days I was more modest than I am now. I wouldn't vote for myself in preference to somebody else. So I voted for a boy named Jimmy Hoover from High Point, and Jimmy beat me—Jimmy was elected with eight votes, and beat me by one. So ever since then I have always voted for myself.

STATEMENT OF EVANS WITT, EDITOR, THE DAILY TAR HEEL, UNIVERSITY OF NORTH CAROLINA

Mr. WITT. Thank you, Mr. Chairman.

I appreciate this opportunity to appear today on behalf of college newspaper editors and the National Student Lobby to discuss the position of student newspapers and the underground press with relation to newsmen privilege laws. I understand the House Judiciary Committee is also hearing today from student newspaper representatives.

I have a prepared statement which I would like to read. It varies somewhat from the statement I submitted in mid-February, as developments since that time have changed my views.

I will be happy to read my statement and then I will answer any questions I can for you.

The current controversy surrounding the use of subpenas on newsmen has a familiar ring to student newspaper editors. Threats from school administrators concerning stories with sources not identified or about stories of disturbing content have been an all too commonplace fact of life for the student journalist. Those involved in the irregular or underground press are also accustomed to harassment by police, prosecutors, and ordinary citizens because their views have been deemed radical.

As both a student and professional journalist for the past 4 years, I had hoped that this hearing and the bills now before this subcommittee would not be necessary. From my admittedly limited study of constitutional law, I read the first amendment to mean exactly what is says about "no law" abridging freedom of the press, which must mean not only the freedom to publish but also the freedom to acquire information to be published. I had hoped that the Supreme Court would take the view that the freedom of the press is one expression of the public's general right to know, a right that must be considered paramount in a society and with a government based on the political decisions made by that same public.

I deeply fear the consequences of limiting freedom of the press by putting it into statutory terminology. I do fear that the endowment of privilege might eventually become little more than a basis for Government retaliation.

But I equally fear the implications of the Court's majority opinion in the *Caldwell*, *Branzburg*, and *Pappas* cases. As I read that opinion, the government is defined as the sole representative of the public interest and the major protector of that interest. The majority decision seems to say that only through government action will the public interest be served, that the government is the only means of redress of a public wrong. The Court seems to ignore the role of the press as the Court of last resort in the righting of many public wrongs. The Court refuses to acknowledge that it has been the press that has, throughout America's history, been the medium for communication of the existence of these wrongs.

Since the American people apparently have a Supreme Court that refuses to recognize the compelling mandates of the first amendment, the people must then turn to Congress for a reaffirmation of these mandates. Of such is the essence of the much-heralded balance of powers within our Federal Government.

Some type of shield legislation seems necessary, even more so for the noncommercial and irregular media than for the usually recognized members of the fourth estate. While the commercial press has considerable financial resources to fight a subpena, the college newspaper editor or the underground paper reporter has no such buffer. If subpenaed, he or she faces a straightforward dilemma—testify or be jailed. For these journalists, there really is no path of appeal.

I have been asked to discuss specifically whether student newspapers, unofficial campus newspapers and underground papers should be included in a "newsman's privilege" law. To this I answer an emphatic yes, based on an appreciation of the history of the first amendment and these newspapers' function.

When the protection of the press was included in the Bill of Rights, the press did not mean the "mass media"—such did not exist. Printing was too slow, too expensive and too cumbersome for production and distribution of more than a few thousand copies. Many newspapers and opinion journals were published by laborious hand copying or with just a few hundred copies printed. In fact, the first American student newspaper, the *Students' Gazette* at the William Charter School in Philadelphia, was published in 1777 as a handwritten newssheet.

Freedom of the press in the late 18th century was identified as a personal right as well as a corporate one. We seem to have lost sight of the basically personal orientation of this right even as the pamphleteer has been submerged under the tide of the million-plus circulation daily newspaper. As Justice White admitted in his majority opinion in the *Caldwell* case:

"The traditional doctrine (is) that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."

The student press has been waging a difficult fight over the past several years, a battle which is by no means finished, to be recognized as protected by the first amendment. Precedents are just now being firmly established by the Federal courts that the student journalist is entitied to much the same protections as the professional. As one authority has pointed out, the protection of freedom of the press based on its informing function can easily be applied to the student paper on campus, but not so easily to the underground paper.

The struggle of the irregular and student press for recognition has been hampered by the failings and irresponsibility that have undeniably been a part of the experience. Both the irregular and students press have been crucial to the information flow in this country. Many of the atrocities of the Vietnam war were first revealed by such underground and college press services as the Liberation News Service and the College Press Service. Student and underground newspapers in some areas have been instrumental in revealing injustice, corruption, and stupidity where the local regular press was afraid to move. College newspapers in the South were in the forefront of publicizing and keeping the public aware of the legitimate grievances of the black man and woman. The college press has served as both a training ground for journalists and a primary center for the forward-looking experimentation that pressures the commercial press toward constant improvement.

May I quote from *Webster's Dictionary*, as a Federal District Court Judge did in a landmark case rejecting the contention that a student newspaper is not a newspaper and not a member of the press:

"Newspaper: a paper printed and distributed, at stated intervals, usually daily or weekly, to convey news, advocate opinions, etc."

A second question is whether the student and the irregular press need this type of protection of "newsman's privilege." Again the answer is yes. While repression from school officials is somewhat less than in previous years, the threats from outside authorities have increased. The threats to the underground press are, if anything, greater today than ever before. Some might think that I am discussing only possibilities, not actual situations; please listen to this list:

Annette Buchanan, editor of the University of Oregon student paper, was subpenaed to testify in 1966 and faced a long series of appeals which reached the U.S. Supreme Court in an early landmark shield case.

Thomas Miller, a reporter for the College Press Service was subpenaed by a Federal grand jury recently to reveal confidential information about political dissidents.

The Office of the *Stanford Daily News* at Stanford University, one of the truly prestigious college newspapers, was ransacked by police seeking notes, unpublished photographs and other unpublished information.

Sherrie Bursey and Brenda Joyce Presley of the Black Panther newspaper, were ordered by a Federal grand jury to disclose confidential information.

Mark Knops, editor of the Madison, Wis., *Kaleidoscope*, an underground paper, was sentenced to 6 months in jail for refusing to reveal the source of published information.

Arthur Kunkin and Robert G. Applebaum of the *Los Angeles Free Press*, a weekly underground paper, were sent to jail after publishing and refusing to reveal the source of a list of undercover narcotics agents.

These are cases I have been able to discover; I am sure that there are others. There must be many cases which have not come to light where the threat of the subpena or a contempt citation has forced a student journalist to break a pledge of confidence.

Thus, I support legislation to shield reporters and all newsmen. An absolute shield, perhaps the one outlined in S. 158 sponsored by Senator Alan Cranston, is closest to what I would support. I could not support a qualified bill for it would create more dangers and greater threats to freedom of the press than the current situation. The experience with qualified shield laws in the various states has shown that any qualification only gives grand juries loopholes through which newsmen can be hauled to testify. Any qualified bill would be worse than useless to the student and underground press since many district attorneys and courts would still feel that these are not members of the press or would use the loopholes in the law to call the "irregular" journalist anyway.

The collegiate press (both official and unofficial), the high school press, the underground press, and the specialized press are members of the Fourth Estate, entitled to the full protections and its heavy burdens. They are, thus, equally entitled to protection under any statutory "newsman's privilege" legislation.

Senator ERVIN. My bill says a newsman is any person who is regularly engaged in collecting information or making pictures for dissemination to the public by any means of communication.

Mr. WITT. Yes, sir. That is the way I would like to see it written. The words I fear and the way, at least I understand it is now written, is in the occupation of collecting information. This might be a loophole, and that is what I fear.

Senator ERVIN. I see your point, but I don't believe it is a loophole as you suggest. My bill says a man regularly employed. That means work. Whether he gets any pay or not, it makes no difference; whether or not he has an employer, it makes no difference. The question is whether or not it is work, and I use that in the very broad sense of the word.

Mr. WITT. I am afraid someone may use it in a very narrow sense.

Senator ERVIN. I am thinking about an editor. Some bills protect editors, but my bill as I see it, would protect an editor only if he was gathering information. Not if he was expressing opinion. Fortunately as bad as the imprisonment of all these newsmen has been, none has been imprisoned because of the opinions he has expressed. Expressing opinion is really the function of an editor; putting him in a category by himself.

I certainly agree with you that freedom of the press is the only thing which makes violent revolution unlikely in America. In other words, our whole existence at a Nation, I think, is staked on the proposition that we should have freedom of the press; that the press should call the attention of society to any injustices or any inequities existing in society. I don't care whether it is the *New York Times* or an underground newspaper or a students newspaper, which is the source of the information. Our faith is based on hope and trust that eventually those who have the power to make laws are going to correct these injustices and inequities. I think that is one of the great functions our press performs for the country.

I certainly agree with you about student newspapers. I have a son who is a superior court judge in North Carolina. I was intrigued by a case he had in Charlotte. It was in a high school. Several of these high school students had a little mimeograph machine, and they mimeographed things that some members of the school authorities didn't like to have circulated on the campus. They didn't take any action against the students but they got the city to take action. They found out where this mimeograph machine was. It was in a residential section, and they got the city to proceed on the basis that it was in violation of the zoning law for them to operate this mimeograph machine and run this high school paper. My son held in the case that the first amendment applied and that the students were exercising their rights to freedom of the press. He held that the Constitution of the United States, and specifically the first amendment, took superiority over the zoning ordinance of the city of Charlotte, which I think was quite a correct decision.

I know that the *Daily Tar Heel* for a long time has been living up to life and liberty. In other words, I think it stands for the right of people to be free. I have always been proud that Chapel Hill has stood for the liberty of students as well as the liberty of people. It has been about as free of coercive effort to try to keep any student from developing his full potentialities as any school I know anywhere in the country. I am proud of my alma mater for that reason.

I want to thank you for making a very significant contribution to our discussion. I certainly agree that the original press, the pamphleteers, such as Tom Paine, contributed enormously to our understanding of democracy because of the things they wrote in the pamphlets which they circulated. So that is the reason I think you need protection for any media of communication, whether a mimeograph machine or whether it is handwritten paper that is intended to try to convey information to the public, be that public small or great.

Mr. Witt. Thank you, sir.

Senator Ervin. Thank you very much.

Mr. Baskir. Mr. Chairman, our final witness this morning is Alphonzo Bell, Member of Congress from California.

Senator Ervin. Congressman, I want to welcome you to the subcommittee and thank you for your willingness to come and assist us in the study of a very serious problem. I especially wish to commend you for allowing the other witnesses who came from outside of Washington to come before you. As you know, under our rules, we normally given Congressman precedence in testifying.

STATEMENT OF HON. ALPHONZO BELL, A REPRESENTATIVE IN CONGRESS FROM THE 28TH DISTRICT IN THE STATE OF CALIFORNIA

Mr. BELL. Thank you very much, Senator.

I appreciate the very great work you have been doing over the years in this and other important matters.

I am very pleased to have this opportunity to appear before you today. I am going to summarize the more comprehensive statement I have submitted for the record, which indicates why I think congressional action is absolutely necessary and then deals with the provisions I think should be included in any measure passed by the Congress.

As to any legislation at all, I think it is necessary to clear up a common misconception which was expressed in the majority opinion of the Supreme Court in the *Branzburg* case, when Justice Byron White wrote that:

> We cannot seriously entertain the notion that the first amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. (At page 26.)

I would maintain that "to write about crime" it "to do something about it." Bringing criminal conduct to light in the press alerts law enforcement officials to the existence of crime of which they would have remained unaware but for the work of the reporter and the cooperation of his confidential source. And news reports on crime also arouse the public to demand more effective law enforcement from and within agencies of the Government which are at times complacent or corrupt. The Supreme Court has created a dichotomy between "writing" and "doing" which simply does not exist, and there is little reason for the Congress to follow the same specious reasoning.

I believe that my own bill contains four provisions which make it particularly effective: establishment of an absolute privilege, applicability to the States, limitation to newsmen and limitation to instances involving a pledge of confidentiality.

If legislation is to achieve our goals, the immunity it establishes must be absolute and inviolable. A qualified privilege, no matter how carefully and responsibly worded, cannot possibly assure news sources to whom confidentiality is essential that their identities will not be revealed in open court. Legislation creating a qualified privilege requires a judicial decision in each individual case as to whether the reporter will be forced to testify, and therefore totally lacks the predictability which is essential to the guaranteeing a source's anonymity.

No solution is perfect, however, and there are admittedly costs to society imposed by an absolute privilege. I am chiefly concerned with the problem of libel. The absolute privilege would have little bearing on a libel suit involving a newsman as defendant and an ordinary citizen as plaintiff, since the citizen could establish the falsity of the newsman's claim, and shift the burden of production to the defendant. If the newsman then chooses to invoke his testimentary immunity, he will lose the suit, and the libeled plaintiff will not have been harmed by the privilege. The problem arises only in cases involving public figures, in which the plaintiff must prove not only that the charge was false. but that it was published with malice. (*New York Times* v. *Sullivan.*) Since it may well be nearly impossible to prove malicious intent without knowledge of the newsman's source or the information he received, the absolute testimentary privilege may work to make newsmen immune from libel actions by public figures.

This prospect is not a pleasant one to contemplate. But the alternative—exempting public figure libel suits from the privilege—is no better. Although sources with information sufficient to withstand the scrutiny of a libel action may not be deterred by a libel loophole in the newsmen's privilege, those sources who are uncertain whether their knowledge meets the legal criteria will be reluctant to talk to a reporter, and a news story that might have stimulated a deeper investigation which proves a crime will go unpublished. To protect the press from governmental interference except where the conduct of public officials is concerned would certainly appear contrary to sound public policy.

In answering the question of whether we as public figures are willing to risk some sacrifice in order to guarantee a free press, I believe we must come out on the side of absolute protection. If irresponsible journalism becomes the order of the day, we can then write a more restrictive statute.

Any newsmen's privilege statute must apply to state proceedings if it is to be truly effective in safeguarding our free press. Federal action makes up only a small percentage of all proceedings in which a journalist can be compelled to testify. Furthermore, fewer than half the states have enacted privilege statutes of their own, and most of the existing statutes are inadequate.

Yet the inadequacy of current state statutes is not the chief reason why Congress must act; the chief reason is that the protection of a free press is truly a Federal question requiring a Federal solution. If a grand jury in New York State is permitted to force a reporter for the *New York Times* to testify for example, the residents of New York are by no means the only people affected if the *Times* ceases to publish stories on whatever topic the reporter was covering. Every person throughout the United States who reads the *Times*, or who reads a newspaper which uses the Times News Service, or who watches a television network which on occasion covers news which first appears in the *Times*, will be as deprived as the New Yorkers. The example of broadcast journalism is perhaps even more striking, since network news programs and documentaries which are produced within one State jurisdiction are broadcast throughout the United States.

There is no doubt that state legislatures are best equipped to decide questions of interest to the citizens of the individual states. Yet this Congress need and should not defer to the individual states to resolve a question which involves the rights of free press and free speech which belong to every American, regardless of where he chooses to live.

The constitutional issue is examined in the statement I have submitted for the record.

Let me just say now that although the interstate commerce of ideas cannot be equivalent to the interstate commerce of goods, and is therefore expressly not subject to Federal regulation, the interstate commerce of goods is highly dependent on information. There can be no doubt that whenever the press publishes a story on the status of a Government contract, or on the expected action of a Federal regulatory agency, or on the prospects for a strike at a steel plant, or on the contamination of some foodstuff that is currently on sale, interstate commerce is affected. And since our free market economy can only work properly and efficiently when all economic decisions are based on the most complete and full information possible, we in Congress have an absolute responsibility to assure that no Government action interferes with the dissemination of information.

Although I favor strong legislation, I do favor some limitations on the privilege. Specifically, I believe that only members of the press should be entitled to invoke it, and then only when a pledge of confidentiality is involved. Whereas the press has demonstrated that it needs this protection for the public good, scholars and other occasional authors have not demonstrated a need so compelling as to outweigh the public's interest in obtaining information helpful to law enforcement. Indeed, the essence of scholarship is to buttress a thesis to as great an extent as possible by facts, which must be revealed, usually in footnotes, if the thesis is to be credible.

Nor do I see any need to protect a newsman from answering questions which concern information which he has received without a pledge of confidentiality. If a newsman happens to observe the commission of a crime, there is little reason why he should not be as subject to a grand jury subpena as any other observant bystander. Forcing a newsman to testify only impedes the free flow of information where that testimony would betray a news source's trust in the newsman. Where no confidentiality is involved, there appears to be no compelling need to provide newsmen with immunity.

I believe that this combination of strong and nationwide protection with reasonable conditions on applicability which are known in advance represents the most effective method to guarantee the public's right to information.

Thank you, Mr. Chairman.

Senator **Ervin**. We all recognize that people who enjoy the freedom of the press sometimes abuse that freedom. But isn't that true of any freedom? Wherever people have freedom, they have the freedom to act wisely or foolishly, don't they—otherwise they have no freedom?

Mr. **Bell**. That is right.

Senator **Ervin**. And the only way to prevent abuse of any freedom, whether of speech or press or any other freedom, is to destroy freedom, because as long as we have freedom, some people are going to abuse it.

Mr. **Bell**. That is right.

Senator **Ervin**. You have made a very fine discussion, and I think you and I are pretty near agreement. Our views almost dovetail each other in respect to this.

Don't you agree with me that regardless of whether a privilege is broad or narrow in scope, it must be absolute in nature?

Mr. **Bell**. I agree with that.

Senator **Ervin**. If we establish exceptions to any newsman's shield law, we can expect that those exceptions will soon swallow up the protection that we try to give, can't we? In other words, except by establishing a lot of exceptions to a shield law, we nullify the value of a shield law?

Mr. **Bell**. If I understand you correctly, yes.

Senator **Ervin**. There is no doubt in your mind of the fact that the Congress has the power to pass a law of this nature on account of the fact that the transmission of information across state lines constitutes interstate commerce?

Mr. **Bell**. I would think so, yes, Mr. Chairman.

Senator **Ervin**. And the Supreme Court has held in a number of cases that the due process clause of the Fourteenth Amendment makes the First Amendment applicable to the states. I think you and I probably agree that we would rather that the Supreme Court had settled this problem by balancing the interests of society in knowing what is going on and the interest of society in enforcement of the law, so as to protect both of these interests to the maximum extent possible. The fact that the Supreme Court held that a newsman had no privilege under the first amendment, makes it imperative that we have some congressional legislation; doesn't it?

Mr. **Bell**. Yes, Mr. Chairman, I think it makes it very important.

Senator **Ervin**. The right to publish information and disseminate information to the public is very much curtailed in value if the Government imposes inhibitions on the collecting of information?

Mr. **Bell**. I would agree, sir.

Senator **Ervin**. If you can't collect information, your right to disseminate doesn't amount to much.

Mr. **Bell**. That is right. The public is at a loss on this too.

Senator **Ervin**. I take it you agree with me that the freedom of the press is essential if our country is going to remain a free society, and for the Government of this country to function properly?

Mr. **Bell**. I certainly would agree with that, Mr. Chairman.

Senator **Ervin**. I want to thank you for a most illuminating statement.

The subcommittee will adjourn subject to right to recall. The record will be kept open for further statements for 10 days.

I want to take this occasion to thank everyone who has participated in these hearings in any capacity whatever. I particularly want to commend the fine work which Larry Baskir, the chief counsel of the Subcommittee on Constitutional Rights, has done in this field, and the fine work which Britt Snider, counsel for the Subcommittee on Constitutional Rights, has also done in this field. They both have shown tireless industry in the study of this problem, in arrangements for the hearing, in securing the attendance of witnesses, and for the excellence of these hearings. I think the hearings have been excellent due in large measure to the untiring work which they have put in in preparing for them.

We stand in recess subject to recall.

[Whereupon, at 12:07 p.m., the hearing recessed, subject to the right to recall.]

APPENDIX

93d CONGRESS
1st Session

S. J. RES. 8

IN THE SENATE OF THE UNITED STATES

January 4, 1973

Mr. Hartke introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

To protect nondisclosure of information and sources of information coming into the possession of the news media.

Whereas it is vital to the health of a democratic society that the press remain free of governmental restraints; and

Whereas recent court decisions have jeopardized the ability of the press to collect information from confidential sources; and

Whereas the inability of the press to hold confidential information or sources of information is a single threat to the continued functioning of a free and great Republic: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That any person employed by or otherwise associated with any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station, or who is independently engaged in gathering information intended for publication or broadcast cannot be required by a court, the legislature, or any administrative body, to disclose before the Congress or any other Federal court or agency, any information or the source of any information procured for publication or broadcast.

93d CONGRESS
1st Session

S. 36

IN THE SENATE OF THE UNITED STATES

January 4, 1973

Mr. Schweiker introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide certain protection against disclosure of information and the sources of information obtained by newsmen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Protection of News Sources and News Information Act of 1973".

Sec. 2. No person shall be required by any grand jury, agency, department, or commission of the United States or by either House of or any committee of Congress to disclose any information or communication or the source of any information or communication received, obtained, or procured by that person in his or her capacity as a reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station or network, or cable television system.

SEC. 3. Except as provided in section 4, no person shall be required by any court of the United States to disclose any information or communication or the source of any information or communication received, obtained, or procured by that person in his or her capacity as a reporter, editor, commentator, journalist, writer, correspondent, announcer, or other person directly engaged in the gathering or presentation of news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station or network, or cable television system.

SEC. 4. Any person seeking information or the source thereof protected under section 3 of this Act may apply to the United States district court for an order divesting such protection. Such application shall be made to the district court in the district wherein the hearing, action, or other proceeding in which the information is sought is pending. The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that (1) there is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (2) has demonstrated that the information sought cannot be obtained by alternative means less injurious to the gathering and dissemination of information to the public; and (3) has demonstrated a compelling and overriding national interest in the information.

93d CONGRESS
1st Session

S. 158

IN THE SENATE OF THE UNITED STATES

March 8, 1973

Referred to the Committee on the Judiciary and ordered to be printed

---

AMENDMENTS

Intended to be proposed by Mr. Cranston (for himself and Mr. Kennedy) to S. 158, a bill to insure the free flow of information to the public, viz: On page 1, strike out all after the enacting clause and insert the following in lieu thereof:

That this Act may be cited as the "Free Flow of Information Act".

FINDINGS AND DECLARATION OF PURPOSE

Sec. 2. The Congress finds and declares that—

(1) the purpose of this Act is to preserve the free flow of news to the public through the news media;

(2) a public fully informed about events, situations, or ideas of public concern or public interest or which affect the public welfare is essential to the principles as well as the effective operation of a democracy;

(3) the public is dependent for such news on the news media;

(4) those in the news media who regularly gather, write, or edit news for the public or disseminate news to the public must be encouraged to gather, write, edit, or disseminate news vigorously so that the public can be fully informed;

(5) such persons can perform these vital functions only in a free and unfettered atmosphere;

(6) such persons must not be inhibited, directly or indirectly, in the performance of such functions by governmental restraint or sanction imposed by governmental process;

(7) compelling such persons to present testimony or produce material or information which would reveal or impa[illegible]urce or reveal the content of any published or unpublished information in their possession dries up confidential and other news sources and serves to erode the public concept of the press and other news media as independent of governmental investigative, prosecutorial, or adjudicative processes and functions and thereby inhibits the free flow of news to the public necessary to keep the public fully informed;

(8) there is an urgent need to provide effective

measures to halt and prevent this inhibition in order to preserve a fully informed public;

(9) the practice of the news media is to monitor and report across State boundaries those events, situations, or ideas originally reported locally in one State which may be of concern or interest to or affect the welfare of residents of another State;

(10) the free flow of news to the public through the news media, whether or not such news was originally published in more than one State, affects interstate commerce;

(11) this Act is necessary to implement the first and fourteenth amendments to the Constitution of the United States and article I, section 8 thereof by preserving the free flow of news to the public, the historic function of the freedom of the press.

EXEMPTION

SEC. 3. No person shall be compelled pursuant to subpena or other legal process issued under the authority of the United States or of any State to give any testimony or to produce any document, paper, recording, film, object, or thing that would—

(1) reveal or impair any sources or source relations, associations, or information received, developed, or

maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium; or

(2) reveal the content of any published or unpublished information received, developed, or maintained by a newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium.

PRESUBPENA STANDARDS AND PROCEDURES

SEC. 4. (a) No subpena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman shall be issued under the authority of the United States or of any State, except upon a finding that—

(1) there are reasonable grounds to believe that the newsman has information which is (A) not within the exemption set forth in section 3 of this Act, and (B) material to a particular investigation or controversy within the jurisdiction of the issuing person or body;

(2) there is a factual basis for the investigation or for the claim of the party to the controversy to which the newsman's information relates; and

(3) the same or equivalent information is not available to the issuing person or body from any source other than a newsman.

(b) A finding pursuant to subsection (a) of this section shall be made—

(1) in the case of a court, grand jury, or any officer empowered to institute or bind over upon criminal charges, by a judge of the court;

(2) in the case of a legislative body, committee, or subcommittee, by the cognizant body, committee, or subcommittee;

(3) in the case of an executive department or agency, by the chief officer of the department or agency; and

(4) in the case of an independent commission, board, or agency, by the commission, board, or agency.

(c) A finding pursuant to subsection (a) of this section shall be made on the record after hearing. Adequate notice of the hearing and opportunity to be heard shall be given to the newsman.

(d) An order of a court issuing or refusing to issue a subpena or other legal process pursuant to subsection (a) of this section shall be an appealable order and shall be stayed by the court for a reasonable time to permit appellate review.

(e) A finding pursuant to subsection (a) of this section made by a body, agency, or other entity described in clause (2), (3), or (4) of subsection (b) of this section shall be subject to judicial review, and the issuance of the subpena or other legal process shall be stayed by the issuing body, agency, or other entity for a reasonable time to permit judicial review.

SPECIAL LIMITATIONS

SEC. 5. (a) A finding under section 4 of this Act shall not in any way affect the right of a newsman to a de novo determination of rights under section 3 of this Act.

(b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the invalidated provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

DEFINITIONS

SEC. 6. For the purposes of this Act:

(1) The term "information" includes fact and opinion and any written, oral, or pictorial means for communication of fact or opinion.

(2) The term "news" means any communication of information relating to events, situations, or ideas of public concern or public interest or which affect the public welfare.

(3) The term "newsman" means any person (except an employee of the Federal Government or of any State or other governmental unit while engaged in disseminating information concerning official governmental policies or activities) who is or was at the time of his exposure to the

information or thing sought by subpena or legal process an operator or publisher of a news medium, or who is or was at such time engaged on behalf of an operator or publisher of a news medium in a course of activity the primary purpose of which was the gathering, compiling, composing, reviewing, editing, publishing, or disseminating of news through any news medium; and includes a freelance writer who has disseminated news on a regular or periodic basis to the public.

(4) The term "news medium" means any newspaper, periodical, book, other published matter, radio or television broadcast, cable television transmission, or other medium of communication, by which information is disseminated on a regular or periodic basis to the public or to another news medium.

(5) The terms "operator or publisher" mean any person engaged in the operation or publication of any news medium.

(6) The term "State" means any of the several States, territories, or possessions of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

Amend the title so as to read: "A bill to preserve the free flow of news to the public through the news media."

93d CONGRESS
1st Session

S. 318

IN THE SENATE OF THE UNITED STATES

January 11, 1973

Mr. Weicker (for himself, Mr. Bible, Mr. Brooke, Mr. Cannon, Mr. Cook, Mr. Fannin, Mr. Javits, Mr. Moss, Mr. Pell, Mr. Taft, and Mr. Young) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To safeguard the professional news media's responsibility to gather information, and therefore to safeguard the public's right to receive such information, while preserving the integrity of judicial processes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "News Media Source Protection Act".

STATEMENT OF POLICY AND FINDINGS

Sec. 2. (a) (1) It is the policy of the United States to permit the flow of information from individuals through the media to the public with reasonable freedom from governmental intrusion, so that constitutional protection of a free flow of news is divested only when a compelling and overriding interest in the source of such information can be demonstrated.

(2) It is further the policy of the United States that the news media not serve as an investigative arm of the Government.

(3) It is at the same time the policy of the United States that its tradition of maintaining the "right of everyman's testimony" in courts of law shall not be casually disturbed. This tradition, which safeguards the integrity of our judicial processes, shall be outweighed by interests in a free flow of news only when legitimate, substantial, and ongoing professional news media operations are at stake. In addition, the balancing of such fundamental interests must be evaluated at a responsible level of judicial competence, guided by complete standards and procedures to insure uniformity of enforcement and permit substantial predictability for those who seek to operate within the law.

(b) (1) The Congress finds that to protect such constitutional and common law principles, as well as to prevent the use of news media for investigative purposes, two procedural safeguards are needed, as threshold determinations, prior to any consideration of compulsory disclosure of news media sources. First, it must be demonstrated that there is probable cause to believe a crime has been committed, and that the testimony sought is directly relevant to a central issue in that criminal allegation, thereby limiting so-called fishing expeditions. Second, it must be demonstrated that no reasonable alternative for obtaining the testimony is available, assuring that constitutional protection of the free flow of news shall not be divested while reasonable alternatives exist. The nature and interests of Federal grand juries, Federal congressional committees, as well as agencies, departments, or commissions of the Federal Government do not, within the safeguards of strict judicial processes, make a threshold legal determination of probable cause that a crime has been committed or that testimony is of direct relevance to such a crime. In addition, such bodies can normally fulfill their functions by alternative means less destructive of first amendment protections than by compulsory testimony as to news media sources. The Congress therefore finds that absolute testimonial protection as to news sources shall be granted with respect to all Federal bodies, excepting only Federal district courts, Federal circuit courts, and the Supreme Court.

(2) The Congress finds that in keeping with stated policies there shall be qualified testimonial protection, based on the two procedural safeguards, as well as three substantive safeguards, before all such Federal courts. Such qualifications

shall be interpreted according to specific standards as to the relevance and weight of the evidence sought, alternative available evidence, the person seeking to invoke protection, the sources or material to be protected, and the specific crime at issue. The Congress finds that any order thus compelling testimony, while an order other than a final judgment, is nevertheless an interlocutory decision having a final and irreparable effect on the rights of parties, thus necessitating that courts of appeals have jurisdiction over immediate appeals from such orders. The Congress further finds that due to the nature of certain defamation proceedings, testimonial protection shall be generally divested in such cases, and that to preserve the flow of information as to abuses of power by public officials testimonial protection shall not be divested in such cases.

LEGITIMATE MEMBER OF THE PROFESSIONAL NEWS MEDIA

SEC. 3. (a) As used in sections 5 and 6 of this Act, a legitimate member of the professional news media shall include any bona fide "newsman", such as an individual regularly engaged in earning his or her principal income, or regularly engaged as a principal vocation, in gathering, collecting, photographing, filming, writing, editing, interpreting, announcing, or broadcasting local, national, or worldwide events or other matters of public concern, or public interest, or affecting the public welfare, for publication or transmission through a news medium.

(b) Such news medium shall include any individual, partnership, corporation, or other association engaged in the business of—

(1) publishing any newspaper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, or has a paid general circulation and has been entered at a United States post office as second-class matter, and that contains news, or articles of opinion (as editorials), or features, or advertising, or other matter regarded as of current interest; or

(2) publishing any periodical containing news, or advertising, or other matter regarded as of current interest which is published and distributed at regular intervals, and has done so for at least one year, or has a paid general circulation and has been entered at a United States post office as second-class matter; or

(3) collecting and supplying news, as a "news agency," for subscribing newspapers, and/or periodicals, and/or news broadcasting facilities; or

(4) sending out syndicated news copy by wire, as a "wire service," to subscribing newspapers, and/or periodicals, and/or news broadcasting facilities; or

(5) gathering and distributing news as a "press association" to its members as an association of newspapers, and/or periodicals, and/or news broadcasting facilities; or

(6) broadcasting as a commercially licensed radio station; or

(7) broadcasting as a commercially licensed television station; or

(8) broadcasting as a community antenna television service; or

(9) regularly making newsreels or other motion picture news for paid general public showing.

(c) Any protections granted pursuant to sections 5 and 6 of this Act shall extend only to activities conducted by a legitimate member of the professional news media while specifically acting as a bona fide "newsman", such as while acting as a reporter, photographer, journalist, writer, correspondent, commentator, editor, or owner.

NEWS MEDIA SOURCES

SEC. 4. (a) Any protections granted under sections 5 and 6 of this Act shall extend only to sources of written, oral, or pictorial information or communication, as well as such of its content that affects sources, whether published or not published, concerning local, national, or worldwide events, or other matters of public concern, or public interest, or affecting the public interest, obtained by a person acting in the status of a legitimate member of the professional news media.

(b) Source of written, oral, or pictorial information or communication shall include the identity of the author, means, agency, or person from or through whom information or communication was procured, obtained, supplied, furnished, or delivered. Any protection of such sources shall also include written, oral, or pictorial information or communication that could directly or indirectly be used to identify its sources, or any information or communication withheld from publication pursuant to an agreement or understanding with the source or in reasonable belief that publication would adversely affect the source. Such information or communication shall specifically include written notes, tapes, "outtakes," and news film. Information or communication used for blackmail, or for illegal purposes not related to publication of such information or communication, is specifically not protected under the provisions of this Act.

ABSOLUTE TESTIMONIAL PROTECTION

SEC. 5. Notwithstanding the provisions of any law to the contrary, no legitimate member of the professional news media, as set forth in section 3 of this Act, shall be held in contempt, or adversely prejudiced, before any grand jury, agency, department, or commission of the United States or by either House of or any committee of Congress for refusing to disclose information or communication as to news media sources, as set forth in section 4 of this Act.

QUALIFIED TESTIMONIAL PROTECTION

SEC. 6. (a) Notwithstanding the provisions of any law to the contrary, where a person seeks disclosure of any news media information or communication from a person who may be or have been a legitimate member of the professional news media and who refuses to make such disclosure in a proceeding before any Federal court of the United States, such person seeking disclosure may apply to a United States district court for an order providing such disclosure. Such application shall be made to the district court in the district wherein there is then pending the proceeding in which the information or communication is sought. The application shall be granted only if the court, after hearing the parties, determines that the person seeking the information or communication, by clear and convincing evidence, has satisfied the requirements set forth in section 7 of this Act.

(b) In any application for the compulsory disclosure of news media information or communication, the person or party, body or officer, seeking disclosure must state in writing—

(1) the name of any specific individual from whom such disclosure is sought, if such individual may have been acting as a legitimate member of the professional news media at the time the source disclosed its information or communication; and

(2) the name of any news medium with which such person may have been connected at the time the source disclosed its information or communication; and

(3) the specific nature of the source, or content of information or communication, that is sought to be disclosed; and

(4) the direct relevance and essential nature of such evidence as to a central issue of the action which is the subject of the court proceeding; and

(5) any information demonstrating that evidence to be gained by compulsory disclosure is not reasonably available by alternative means, and that reasonable diligence has been exercised in seeking such evidence otherwise.

(c) Any order entered pursuant to an application made according to the provisions of this Act shall be appealable as a matter of right under rule 4 of the Federal Rules of Appellate Procedure (1968), and is subject to being stayed. In case of an appeal, the protections available according to the provisions of this Act, were such application denied, will remain in full force and effect during the pendency of such appeal. Section 1292 of title 28, United States Code, is therefore amended by inserting, after subsection (4), the following:

"(5) Interlocutory orders in civil or civil or criminal actions granting, modifying, or refusing an application for compulsory disclosure or news media sources, or information or communication affecting news media sources."

STANDARDS FOR QUALIFIED TESTIMONIAL PROTECTION

SEC. 7. (a) An application ıor disclosure, as provided for under section 6 of this Act, shall be granted, so long as it is in accordance with any other applicable general or specific law or rule, when the applicant has established that the person seeking protection of a source is not a legitimate member of the professional news media, as set forth in section 3 of this Act.

(b) Such application for disclosure shall be granted, so long as it is in accordance with any other applicable general or specific law or rule, when the applicant has established that the information or communication sought is not a news media information source, or information or communication affecting a news media source, as set forth in section 4 of this Act. Determination of whether the contents of information or communication could directly or indirectly be used to identify its source, or whether information or communication was withheld from publication pursuant to an agreement or understanding with the source or in reasonable belief that publication would adversely affect the source shall be made in camera, out of the presence of the applicant, on the basis of the court being informed of some of the underlying circumstances supporting the person seeking protection from disclosure, with a presumption in favor of the person seeking protection from disclosure.

(c) Such application for disclosure shall be granted, should the applicant be unable to meet the requirements of subsection (a) or (b) of this section, only when—

(1) the applicant has established by means of independent evidence that the source to be disclosed is of substantial and direct relevance to a central issue of the action, and is essential to a fair determination of the action, which is the subject of the court proceeding; and

(2) the applicant is able to demonstrate that the source is not reasonably available by alternative means,

or would not have been available if reasonable diligence had been exercised in seeking the source otherwise; and

(3) the action which is the subject of the court proceeding is murder, forcible rape, aggravated assault, kidnaping, airline hijacking, or when a breach of national security has been established, involving classified national security documents or details ordered to be kept secret, such classification or order having been made pursuant to a Federal statute protecting national security matters. In no case, however, shall the application be granted where the crime at issue is corruption or malfeasance in office, except according to the provisions of subsection (d) of this section.

(d) Notwithstanding the provisions of subsections (c) (1), (c) (2), and (c) (3) of this section, an application for disclosure shall be granted in any case where the defendant, in a civil action for defamation, asserts a defense based on the source of his or her information or communication.

(e) A complete and public disclosure, with knowledge of the available protections, of the specific identity of a source or content of information or communication protected by the provisions in sections 5 and 6 of this Act shall constitute a waiver of rights available as to such identity or such contents according to the provisions of this Act. A person likewise waives the protections of sections 5 and 6 of this Act, if, without coercion and with knowledge of the available protections, such person consents to complete and public disclosure of the specific identity of a source or content of information or communication by another person. The failure of a witness to claim the protections of this Act with respect to one question shall not operate as a waiver with respect to any other question in a proceeding before a Federal court.

93D CONGRESS
1ST SESSION

S. 451

IN THE SENATE OF THE UNITED STATES

JANUARY 18, 1973

Mr. HATFIELD (for himself, Mr. COOK, Mr. MCGOVERN, Mr. MANSFIELD, Mr. METCALF, and Mr. YOUNG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18, United States Code, to provide for a privilege against disclosure of information and the sources of information obtained by persons in the communications media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part V of title 18, United States Code, is amended—

(1) by striking out the section analysis at the beginning thereof and inserting in lieu thereof the following:

"Chap.	Sec.
"501. General provisions	6001
"503. Witness immunity	6002
"505. Communications media privilege	6111

"Chapter 501.—GENERAL PROVISIONS

"Sec.
"6001. Definitions.";

(2) by inserting immediately below section 6001, the following:

"Chapter 503.—WITNESS IMMUNITY

"Sec.
"6002. Immunity generally.
"6003. Court and grand jury proceedings.
"6004. Certain administrative proceedings.
"6005. Congressional proceedings.";

and

(3) by adding at the end thereof the following new chapter:

"Chapter 505.—COMMUNICATIONS MEDIA PRIVILEGE

"Sec.
"6111. Privilege from disclosure.

"§ 6111. Privilege from disclosure

"(a) Whenever any person who is employed by or otherwise associated with any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station, or who is independently engaged in gathering information intended for publication or broadcast, is ordered to testify or provide other information in a proceeding before or ancillary to a court, grand jury, or agency of the United States or by either House of Congress, any committee or subcommittee of either House, or any joint committee of the two Houses, such person shall not be required to disclose any such information or the sources of any such information coming into his possession in the course of gathering or obtaining news for publication, or to be published, in a newspaper, periodical, magazine, or for broadcast by a radio or television transmission station or network.

"(b) The provisions of subsection (a) shall not apply to the sources of any allegedly defamatory information in any case in which the defendant, in a civil action for defamation, asserts a defense based on the source of such information."

93D CONGRESS
1ST SESSION

S. 637

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 1973

Mr. MONDALE (for himself, Mr. BURDICK, Mr. HASKELL, Mr. HUMPHREY, Mr. MCGOVERN, Mr. MANSFIELD, Mr. PELL, Mr. PROXMIRE, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To protect the free flow of information coming into the possession of the media of communication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be entitled the "Free Flow of Media Information Act".

SECTION 1. The Congress hereby finds and declares that—

(a) those who gather, write, or edit information for the public or disseminate information to the public can perform a vital function which can only be properly exercised in a free and unfettered atmosphere, marked by the absence of direct or indirect governmental restraint or sanction imposed by governmental process;

(b) such persons must be encouraged to gather, write, edit, or disseminate information vigorously and freely so that the public can be fully informed;

(c) such persons, to properly exercise their freedom to gather, write, edit, or disseminate such information must rely on a wide variety of sources for information;

(d) compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest, and inhibits the free flow of information to the public;

(e) the inhibition of the free flow of information through any medium of communication to the public adversely affects interstate commerce; and

(f) the purpose of this Act is to implement the urgent need to provide effective measures to halt and prevent this inhibition and insure the free flow of news and other information to the public.

Sec. 2. Except as provided in section 4, no person shall be required to disclose in any Federal or State proceeding either—

(a) the source of any published or unpublished information obtained in the gathering, receiving, or processing of information for any medium of communication to the public, or

(b) any unpublished information obtained or prepared in the gathering, receiving, or processing of information for any medium of communication to the public.

SEC. 3. For the purpose of this Act, the term—

(a) "Federal or State proceeding" includes any proceeding or investigation before or by any Federal or State judicial, legislative, executive, or administrative body.

(b) "Medium of communication" includes any newspaper, magazine, or other periodical, book, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system.

(c) "Information" includes any written, oral, or pictorial news or other material.

(d) "Published information" means any information disseminated to the public by the person from whom disclosure is sought.

(e) "Unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

(f) "Processing" includes compiling, sorting, and editing of information.

(g) "Person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

SEC. 4. (a) In any Federal proceeding where a person seeks information or the source of information protected by section 2, no subpena ad testificatum, subpena duces tecum, or any other compulsory process demanding disclosure of sources of information or information protected by section 2 shall be issued unless such person applies to the United States district court for an order divesting such protection. Such application shall be made to the district court in the district wherein the proceeding in which the information sought is pending. Timely notice of such application shall be served by the applicant on the person from whom disclosure is sought.

(b) In any State proceeding where a person seeks information or the source of information protected by section 2, no subpena ad testificatum, subpena duces tecum, or any other compulsory process demanding disclosure of sources of information or information protected by section 2 shall be issued unless such person applies to the State trial court of general jurisdiction for an order divesting such protection. Such application shall be made to the State trial court in the judicial district or division wherein the proceeding in which the information is sought is pending. Timely notice of such application shall be served by the applicant on the person from whom disclosure is sought.

(c) Such application shall allege:

(1) the name of the person from whom disclosure is sought,

(2) the specific information sought or the identity of the source sought and its direct relevancy to the proceeding,

(3) the following conditions:

(A) that there is probable cause to believe that the person from whom the information or source of information is sought possesses information or knowledge of the identity of a source of information which is clearly relevant to a specific probable violation of law;

(B) that the Federal or State proceeding has clear jurisdiction over the specific probable violation regarding which such information or the source of such information is sought;

(C) that the information or source of information sought cannot be obtained by alternative means; and

(D) that there exists an imminent danger of foreign aggression, of espionage, or of threat to human life, which cannot be prevented without disclosure of the information or source of information.

(d) The court may issue an order requiring disclosure in whole or in part if, after hearing the parties, it finds that the person seeking divestiture of the protection of section 2, by clear and convincing evidence, has demonstrated the existence of conditions (c) (3) (A), (B), (C), and (D).

Sec. 5. Any order divesting the protection of section 2 shall be subject to appeal. During the pendency of any such appeal, the protection of section 2 shall remain in full force and effect.

93d CONGRESS
1st Session

S. 750

IN THE SENATE OF THE UNITED STATES

February 2, 1973

Mr. Robert C. Byrd (for Mr. Bentsen) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for a privilege against disclosure of information or the sources of information obtained by persons in the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public's Right To Know Act of 1973".

Sec. 2. Congress declares that—

(1) professional newsmen must not be inhibited, restrained, or otherwise impeded by governmental process and ought to be encouraged to gather, write, edit, and disseminate vigorously news and other information in order that the public can fully be informed;

(2) compelling such persons to disclose a source of

information or disclose unpublished information is, except under very limited circumstances, contrary to the public interest and inhibits the free flow of information to the public;

(3) there is an urgent need at both the Federal and State levels of government to provide effective measures to halt and prevent this inhibition; and

(4) it is therefore the purpose of this Act to insure the free flow of news to the public.

SEC. 3. Part V of title 18, United States Code, is amended—

(1) by striking out the section analysis at the beginning thereof and inserting in lieu thereof the following:

“Chap.	Sec.
“501. General provisions	6001
“503. Witness immunity	6002
“505. Communications media privilege	6111

“Chapter 501.—GENERAL PROVISIONS

“Sec.
“6001. Definitions.”;

and

(2) by inserting immediately below section 6001, the following:

“Chapter 503.—WITNESS IMMUNITY

“Sec.
“6002. Immunity generally.
“6003. Court and grand jury proceedings.
“6004. Certain administrative proceedings.
“6005. Congressional proceedings.”.

Sec. 4. Section 6001 of title 18, United States Code, is amended by striking out the word "and" at the end of paragraph (3), by striking out the period at the end of paragraph (4) and inserting in lieu thereof a semicolon and the word "and", and by adding at the end thereof the following new paragraph:

"(5) 'Professional newsman' means any individual who is employed by or otherwise associated with the gathering, recording, photographing, processing, announcing, writing, editing, or analyzing of news material or information for publication or transmission through one of the following news media—

"(A) a newspaper, containing news and articles of opinion, that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least six months, has a paid circulation, and has been entered at a United States post office as second-class matter;

"(B) a periodical containing news, advertising, or other matter regarded as a current interest which has been published and distributed at regular intervals for at least six months or has a paid general circulation and has been entered at a United States post office as second-class matter;

"(C) a news agency collecting and supplying news for subscribing newspapers, periodicals, or news broadcasting facilities or any combination of such news media;

"(D) a wire service sending out syndicated news copy by wire to subscribing newspapers;

"(E) a press association gathering and distributing news to its members as an association of newspapers, periodicals, or news broadcasting facilities, or any combination of such associations;

"(F) a radio or television station licensed under the Communications Act of 1934;

"(G) a community antenna television service; or

"(H) a motion picture news service regularly making news reels for paid general public showing."

SEC. 5. Part V of title 18, United States Code, is further amended by adding at the end thereof the following new chapter:

"Chapter 505.—COMMUNICATIONS MEDIA PRIVILEGE

"Sec.
"6111. Privilege from disclosure.
"6112. Qualifications.
"6113. Exemption.

"§ 6111. Privilege from disclosure

"Upon claiming the privilege provided in this section no professional newsman shall be required to disclose in a proceeding before or ancillary to a court, grand jury, or agency of the United States, or of any State or any political subdivision thereof, or by either House of Congress, any committee or subcommittee of either House, or any joint committee of the two Houses, or any legislature of any State or any committee thereof, or any legislative body of a political subdivision of a State or committee thereof, either—

"(1) the source of any information obtained in the gathering, receiving, or processing of information collected in the course of his employment or association; or

"(2) any unpublished information including but not limited to all notes, outtakes, photographs, and tapes obtained or prepared in gathering, receiving, or processing of information collected in the course of his employment or association.

"§ 6112. Qualifications

"Any person seeking information or the source thereof protected under this Act may apply to the United States district court or the highest trial court of a State for an order requiring the disclosure of that information or source. Such application shall be made to the court in the district wherein the proceeding in which the information is sought is pending. The application shall be granted only after a hearing and upon a determination by the court that—

"(1) the person seeking the information has shown by a preponderance of the evidence that—

"(A) such person has demonstrated that the information sought cannot be obtained by any alternative means; and

"(B) such person has demonstrated a compelling and overriding public interest in the information; or

"(2) such person has shown by a preponderance of the evidence that the information sought involves a matter of national security.

"§ 6113. Exemption

"The provisions of this chapter shall not apply to the sources of any allegedly defamatory information in any case in which the defendant, in a civil action for defamation, asserts a defense based on the source of such information."

SEC. 6. Nothing in this Act shall be construed to affect any State law or local ordinance providing for greater protection of professional newsmen.

93D CONGRESS
1ST SESSION

S. 870

IN THE SENATE OF THE UNITED STATES

FEBRUARY 15, 1973

Mr. EAGLETON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

News Source Protection Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "News Source Protection Act of 1973".

SEC. 2. No newsman shall be compelled pursuant to subpena or other legal process issued under the authority of the United States or of any State or territory to give any testimony or to produce any document, paper, recording, film, object, or thing that would reveal or impair confidential associations, relations, sources, or confidential information received, developed, or maintained by him or by any other newsman in the course of gathering, compiling, composing, reviewing, editing, publishing, or disseminating news through any news medium.

SEC. 3. No subpena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman shall be issued under the authority of the United States or of any State or territory except as expressly authorized by sections 4 and 5 of this Act.

SEC. 4. (a) A court of record may issue a subpena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman at the actual trial of a civil or criminal cause before the court.

(b) No subpena or legal process authorized by subsection (a) of this section shall be issued except by order of the court upon a finding either—

(i) that the testimony or production sought to be compelled relates exclusively to matters unconnected with the newsman's gathering, compiling, composing, reviewing, editing, publishing, or disseminating of news through any news medium; or

(ii) that—

(A) there are reasonable grounds to believe that the newsman has information which is (1) not privileged under section 2 of this Act, and (2) material to the controversy before the court; and

(B) there is a factual basis for the claim of the party to the controversy to which the newsman's information relates; and

(C) the same or equivalent information is not available to the court from any source other than a newsman.

(c) The findings defined by subsection (b) of this section shall be made on the record after hearing. Adequate notice of the hearing and opportunity to be heard shall be given to the newsman.

(d) An order of the court issuing or refusing to issue a subpena or other legal process shall be an appealable order, and shall be stayed by the court for a reasonable time to permit appellate review.

SEC. 5. (a) Other than as authorized by section 4 of this Act, a subpena or other legal process to compel the testimony of a newsman or the production of any document, paper, recording, film, object, or thing by a newsman may be issued only upon a finding that the testimony or production sought to be compelled relates exclusively to matters unconnected with the newsman's gathering, compiling, composing, reviewing, editing, publishing, or disseminating of news through any news media.

(b) The finding defined by subsection (a) of this section shall be made—

(i) in the case of a court, a grand jury, or any officer empowered to institute or bind over upon criminal charges, by a judge of the court;

(ii) in the case of a legislative body, committee or subcommittee, by the cognizant body, committee, or subcommittee;

(iii) in the case of an executive department or agency, by the chief officer of the department or agency; and

(iv) in the case of an independent commission, board or agency, by the commission, board, or agency.

(c) The finding shall be made on the record after hearing. Adequate notice of the hearing and opportunity to be heard shall be given to the newsman.

(d) The finding shall be subject to judicial review, and the issuance of the subpena or other legal process shall be stayed by the issuing agency for a reasonable time to permit judicial review.

SEC. 6. (a) Nothing in this Act shall alter the substantive rights or liabilities of any person under the law of defamation.

(b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

SEC. 7. The following terms are defined for purposes of this Act:

(a) "Newsman" means any person who is or was at the time of his exposure to the information sought by subpena or legal process engaged in a course of activity whose primary purpose was the gathering, compiling, composing, reviewing, editing, publishing, or disseminating of news through any news medium.

(b) "News medium" means any newspaper, magazine, radio or television broadcast, or other medium of communication by which information is disseminated on a regular or periodic basis to the general public.

(c) "News" means any communication of information or opinion relating to events, situations, or ideas of public concern or public interest or which affect the public welfare.

93D CONGRESS
1ST SESSION

S. 917

IN THE SENATE OF THE UNITED STATES

FEBRUARY 20, 1973

Mr. ERVIN (for himself, Mr. JACKSON, and Mr. PEARSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To protect the people's right to know by regulating the testimony of newsmen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Within the purview of this statute, a newsman is any person who is regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by means of a newspaper, a magazine, or a radio or television broadcast.

SEC. 2. No newsman shall be compelled to testify as a witness in any criminal action, criminal proceeding, or criminal investigation before a court of the United States or a grand jury acting under its authority concerning any information collected by him or any picture or negative made by him in the exercise of his occupation, unless it affirmatively appears that he has thereby acquired actual personal knowledge which tends to prove or disprove the commission of the crime charged or being investigated. As used in the preceding sentence, the term "actual personal knowledge" includes, but is not limited to, a voluntary admission or confession of guilt made to the newsman by any person in respect to the crime alleged or being investigated.

SEC. 3. Whenever he is subpenaed to testify as a witness in any criminal action, criminal proceeding, or criminal investigation before a court of the United States or a grand jury acting under its authority, a newsman may appear in obedience to the subpena and invoke the provisions of section 2 of this statute by interposing an oral objection to testifying at the time he is actually called upon to testify. Instead of doing so, however, the newsman may forthwith move before the judge of the court to quash the subpena, and the judge shall thereupon hear the motion in camera, and enter an order quashing the subpena unless the party seeking the testimony of the newsman affirmatively shows that the newsman is compellable to testify under the provision of section 2 of this statute.

SEC. 4. Within the purview of this statute, the term "documentary evidence" means any memorandum, note, picture, negative, recording, tape, or other record made by a newsman in the exercise of his occupation.

SEC. 5. Neither a newsman nor any other person having the custody or control of the same shall be compelled by a subpena duces tecum or order to produce in any criminal action, criminal proceeding, or criminal investigation before any court of the United States or any grand jury acting under its authority any documentary evidence, unless such documentary evidence tends to corroborate or contradict testimony actually given by the newsman pursuant to the provision of section 2 of this statute.

SEC. 6. Whenever he is ordered by subpena duces tecum or order to produce any documentary evidence in any criminal action, criminal proceeding, or criminal investigation before any court of the United States or any grand jury acting under its authority, a newsman or any other person having custody or control of such documentary evidence may appear at the time designated in the subpena or order, and invoke the provisions of section 5 of this statute by orally objecting to the production of such documentary evidence. Instead of so doing, however, the newsman or the other person having the custody or control of the documentary evidence may move to quash the subpena duces tecum or nullify the order before a judge of the court; and the judge shall thereupon proceed to hear such motion in camera and enter an order quashing the subpena duces tecum or nullifying the order unless the party seeking the production of the documentary evidence affirmatively shows that the documentary evidence is relevant to either of the purposes specified in section 5 of this statute.

SEC. 7. This statute shall become effective upon ratification.

93d CONGRESS
1st Session

S. 1128

IN THE SENATE OF THE UNITED STATES

March 8, 1973

Mr. Ervin (for himself, Mr. Brooke, Mr. Fulbright, Mr. Jackson, Mr. McGee, Mr. Mansfield, Mr. Metcalf, Mr. Moss, Mr. Pearson, Mr. Pell, Mr. Proxmire, and Mr. Sparkman) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect the freedom of speech and of the press and to secure the flow of information in interstate and foreign commerce by protecting the newsman against the compulsory disclosure of confidential sources of information and the compulsory production of unpublished information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "Newsman's Privilege Act of 1973".

Sec. 2. The Congress hereby finds and declares that compelling newsmen to disclose their confidential sources of information impairs the willingness of persons having information the people need to know, to communicate the same to newsmen, and deters many of them from so doing; that jailing or otherwise punishing newsmen who refuse to disclose their confidential sources of information or to produce unpublished information tends to intimidate them in the exercise of their occupation and deters many of them from collecting and disseminating to the public, information the people need to know; that for these reasons the right of the people to know what is occurring in our land or elsewhere is seriously impaired; and that this Act is necessary to protect the freedom of speech and of the press and to secure the full flow of information in interstate and foreign commerce.

SEC. 3. As used in this Act—

(a) "Newsman" means an individual who is regularly engaged in the occupation of collecting information or making pictures for dissemination to the public by any means of communication.

(b) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(c) "State" means any State of the United States or the Commonwealth of Puerto Rico, or the District of Columbia, or any territory or possession of the United States.

(d) "Legislative body" means the Congress or the legislature of a State or any committee or subcommittee acting under the authority of the Congress or the legislature of a State.

(e) "Unpublished information" means any memorandum, note, manuscript, transcript, picture, negative, recording, tape, or other record whatsoever which was made or obtained by a newsman while engaged in his occupation and which has not been disseminated to the public by any means of communication.

SEC. 4. A newsman shall not be compelled to disclose to a court, a grand jury, a legislative body, or other investigatory or adjudicative agency of government which acts under the authority of the United States or any State, the identity of any person who supplies information to him while he is engaged in his occupation if he expressly or impliedly gives the person supplying the information a contemporaneous assurance that the source of the information will not be disclosed by him. Nothing contained in the preceding sentence or any subsequent provision of this Act shall be construed to excuse a newsman from testifying to the identity of any person who commits a crime in his presence.

SEC. 5. A newsman may invoke the provisions of section 4 of this Act in either or both of the following ways:

(a) When a newsman appears before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government as a witness in obedience to a subpena, as a party to a civil or criminal action, or otherwise, he may invoke the provisions of section 4 of this Act by an oral or written objection, and the court, the grand jury, the legislative body, or the investigatory or adjudicative agency shall thereupon enter such order or take such action as may be necessary or appropriate to insure that the newsman shall not be compelled to disclose the source of information received by him contrary to the provisions of section 4 of this Act. If the grand jury overrules his objection, the newsman must be accorded a review of its ruling by the judge presiding in the court in which the grand jury sits before he testifies further before the grand jury.

(b) When a newsman is served with a subpena or other order to testify as a witness before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government prior to the time designated for his appearance, he may invoke the provisions of section 4 of this Act by moving that the court in which he is ordered to appear or in which the grand jury sits, or the legislative body, or the investigatory or adjudicative agency quash the subpena or order or limit the testimony he is required to give under it, and the court, legislative body, or investigatory or adjudicative agency shall thereupon hear and determine the motion in camera and enter such order to take such action as may be necessary or appropriate to insure that the newsman shall not be compelled to disclose the source of information received by him contrary to section 4 of this Act.

SEC. 6. Neither a newsman nor any other person having custody or control of the same shall be compelled to produce before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government, which acts under the authority of the United States or any State, anything which constitutes unpublished information within the purview of the definition set forth in section 2 (e) of this Act.

SEC. 7. The provisions of section 6 of this Act may be invoked in either or both of the following ways:

(a) When a newsman or any other person having custody or control of unpublished information is ordered to produce the same before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government, he may invoke the provisions of section 6 of this Act by an oral or written objection, and the court, grand jury, legislative body, or other investigatory or adjudicative agency shall thereupon enter such order or take such action as may be necessary or appropriate to insure that the newsman or other person is not compelled to produce the unpublished information contrary to the provisions of section 6 of this Act. If the grand jury overrules his objection, the newsman or other person must be accorded a review of its ruling by the judge presiding in the court in which the grand jury sits before any production on his part can be required by the grand jury.

(b) When a newsman or any other person having custody or control of unpublished information is served with a subpena duces tecum or other order commanding him to produce such information before a court, grand jury, legislative body, or other investigatory or adjudicative agency of government prior to the time designated for its production, he may invoke the provisions of section 6 of this Act by moving that the court before which the information is ordered to be produced or in which the grand jury sits, or the legislative body, or the investigatory or adjudicative agency quash the subpena duces tecum or order, and the court, legislative body, or investigatory or adjudicative agency shall thereupon hear and determine the motion in camera and enter such order or take such action as may be necessary or appropriate to insure that the newsman or other person having custody or control of the same shall not be compelled to produce unpublished information contrary to the provisions of section 6 of this Act.

SEC. 8. Any person invoking the provisions of section 4 or section 6 of this Act shall have the right to the assistance of counsel of his own choosing.

Sec. 9. Nothing in this Act shall be construed to impair or preempt the enactment or application of any State law which secures the minimum privileges established by this Act.

Sec. 10. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Sec. 11. This Act shall take effect upon its enactment.

SUPREME COURT OF THE UNITED STATES

SYLLABUS

BRANZBURG v. HAYES ET AL., JUDGES

Certiorari to the Court of Appeals of Kentucky

No. 70-85 Argued February 23, 1972—Decided June 29, 1972[*]

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 13–43. No. 70-85, 461 S.W. 2d 345 and No. 70-94, —— Mass. ——, 266 N.E. 2d 297, affirmed; No. 70-57, 434 F. 2d 1081, reversed.

White, J., wrote the opinion of the Court, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, J. J., joined. Powell, J., filed a concurring opinion. Douglas, J., filed a dissenting opinion. Stewart, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

---

[*] Together with No. 70-94, *In re Pappas,* on certiorari to the Supreme Judicial Court of Massachusetts, and No. 70-57, *United States* v. *Caldwell,* on certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPREME COURT OF THE UNITED STATES

(Nos. 70-85, 70-94, and 70-57)

70-85

PAUL M. BRANZBURG *v.* JOHN P. HAYES, JUDGE, ETC., ET AL.

—

70-94

On Writ of Certiorari to the Court of Appeals of Kentucky

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

—

70-57

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by THE CHIEF JUSTICE.

The issue in these cases is whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70-85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Jefferson County, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to reveal the identity of the two hashish makers.[1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana.[2] A state trial court judge[3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky. Rev. Stat. 421.100,[4] the First Amendment of the United States Constitution of §§ 1, 2, and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibiion and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. *Branzburg* v. *Pound*, 461 S. W. 2d 345 (1970), modified on denial of rehearing, *id.*, (1971). It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky. Rev. Stat. 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

---

[1] The article contained the following paragraph: "'I don't know why I'm letting you do this story,' [one informant] said quietly. 'To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed." R., at 3-4.

[2] The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: "#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On November 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?" R., at 6.

[3] Judge J. Miles Pound. The present respondent in this case Hon. John P. Hayes, is the successor of Judge Pound.

[4] Ky. Rev. Stat. 421.100 provides:

"No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Franklin County, Kentucky. The article reported that in order to provide a comprehensive survey of the "drug scene" in Frankfort, petitioner had "spent two weeks interviewing several dozen drug users in the capital city" and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," petitioner Branzburg moved to quash the summons;[5] the motion was denied although an order was issued protecting Brazburg from revealing "confidential associations, sources of information" but requiring that he "answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him]." Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky. Rev. Stat. 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970), and it also announced its "misgivings" about that decision, asserting that it represented "a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment." It characterized petitioner's fear that his ability to obtain news would be destroyed as "so tenuous that it does not, in the opinion of this court, present an abridgement of freedom of the press within the meaning of that term as used in the Constitution of the United States."

Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ.[6] 402 U.S. 942 (1971).

---

[5] Petitioner's Motion to Quash argued:
"If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby be vitally hampered in their ability to cover the views and activities of those involved in the drug culture. The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's appearance before the Grand Jury. It is insufficient merely to protect Mr. Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences." R., at 43–44.

[6] After the Kentucky Court of Appeals' decision in *Branzburg* v. *Meigs* was announced, petitioner filed a rehearing motion in *Branzburg* v. *Pound* suggesting that the Court had not passed upon his First Amendment argument and calling to the Court's attention the recent Ninth Circuit decision in *Caldwell* v. *United States*. On Jan. 22, 1971, the Court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S.W. 2d, at 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky. Rev. Stat. 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase "source of information"

In the Matter of Paul Pappas, No. 70–94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3:00 p.m.[7] He then asked for and received permission to re-enter the area. Returning at about 9:00 p.m. that evening, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid which Pappas, "on his own," was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had transpired in the store while he was there. Two months later, petitioner was summoned before the Bristol County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the Grand Jury and "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the commonwealth before . . . the Grand Jury." His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the Grand Jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts.[8] The record there did not include a transcript of the hearing on the motion to quash nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury securing the information it sought from petitioner by other means.[9] The Supreme Judicial Court, however, took "judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts."— Mass. —, 266 N.E. 2d, at 299. The Court then reaffirmed prior Massachusetts holdings that testimonial privileges were "exceptional" and "limited," stating

---

in Ky. Rev. Stat. 421.100. The passage which the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows:

'Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature."

Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase "source of information" were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in *Branzburg* v. *Pound* was properly preserved for review.

[7] Petitioner's news films of this event were made available to the Bristol County District Attorney. R., at 4.

[8] The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass. Gen. Law, c. 287, § 30A and Mass. Gen. Law, c. 231, § 111. The Supreme Judicial Court's decision appears at —— Mass. ——, 266 N.E. 2d 297 (1971).

[9] "We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what likelihood there is of being able to obtain that testimony from persons other than news gatherers." —— Mass. ——, 226 N.E. 2d, at 299 (footnote omitted).

that "[t]he principle that the public 'has a right to every man's evidence'" had usually been preferred, in the Commonwealth, to countervailing interests. *Ibid.* The Court rejected the holding of the Ninth Circuit in *Caldwell* v. *United States*, *supra*, and "adhere[d] to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury."[10] — Mass. —, 266 N.E. 2d, at 302–303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only "indirect, theoretical, and uncertain." — Mass. —, 266 N.E. 2d, at 302. The court concluded that "The obligation of newsmen . . . is that of every citizen, . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries." — Mass. —, 266 N.E. 2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding judge, who had the duty "to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation," to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress.[11] *Ibid.* The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U.S. 942 (1971).

United States v. *Caldwell*, No. 70-57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena *duces tecum* was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities of that organization.[12] Respondent objected to the scope of this subpoena, and an agreement between his counsel and the government attorneys resulted in a continuance. A second subpoena was served on March 16, which omitted the documentary requirement and simply ordered Caldwell "to appear . . . to testify before the Grand Jury." Respondent and his employer, the New York Times,[13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and "suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants." R., at 7. Respondent argued that "so drastic an incursion upon First Amendment freedoms" should not be permitted "in the absence of a compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the grand jury." *Ibid.* The motion was supported by *amicus curiae* memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S.C. § 871 (threats against the President), 18 U.S.C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. § 231 (Civil disorders), (18 U.S.C. § 2101 (interstate travel to incite a riot), and 18 U.S.C. § 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that "We will kill Richard Nixon" and that this threat had been repeated in three subsequent issues of the Party newspaper. R., at 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that "[i]n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns" and quoting the Chief of Staff of the Party as declaring that "We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle [*sic*]." R., at 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U.S.C. § 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

---

[10] The Court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. —— Mass. ——, 266 N.E. 2d, at 303 n. 10.

[11] The Court noted that "a presiding judge may consider in his discretion" the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work product, —— Mass. ——, 266 N.E. 2d, at 304 n. 13, and cautioned that "We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge." —— Mass. ——, 266 N.E. 2d, at 304 n. 14.

[12] The subpoena ordered production of "Notes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt." R., at 20.

[13] The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. *Application of Caldwell*, 311 F. Supp. 358, 359 (N.D. Cal. 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an *amicus curiae* brief, however.

On April 6, the District Court denied the motion to quash, *Application of Caldwell*, 311 F. Supp. 358 (ND Cal. 1970), on the ground that "*every person* within the jurisdiction of the government" is bound to testify upon being properly summoned. *Id.*, at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent must divulge whatever information had been given to him for publication, he "shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media." The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until that had been "a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." 311 F. Supp., at 362.

Subsequently,[14] the term of the grand jury expired, a new grand jury was convened, and a new subpoena *ad testificandum* was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and by stipulation of the party, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

Respondent Caldwell appealed the contempt order,[15] and the Court of Appeals reversed. *Caldwell* v. *United States*, 434 F. 2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writing in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition[16] for certiorari. 402 U.S. 942 (1971).

---

[14] Respondent appealed from the District Court's April 6 denial of his motion to quash on April 17, 1970, and the Government moved to dismiss that appeal on the ground that the order was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without opinion.

[15] The Government did not file a cross-appeal and did not challenge the validity of the District Court protective order in the Court of Appeals.

[16] The petition presented a single question: "Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles."

I

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put; that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although petitioners do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government,[17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is "compelling" or "paramount," [18] and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.[19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.[20]

We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[21] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

---

[17] *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (opinion of Harlan, J.); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Talley* v. *California*, 362 U.S. 60, 64–65 (1960); *Bridges* v. *California*, 314 U.S. 252, 263 (1941); *Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233, 250 (1936); *Near* v. *Minnesota*, 283 U.S. 697, 722 (1931).

[18] *NAACP* v. *Button*, 371 U.S. 415, 439 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Schneider* v. *State*, 308 U.S. 147, 161 (1939); *NAACP* v. *Alabama*, 357 U.S. 449, 464 (1958).

[19] *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964); *Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1943); *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).

[20] There has been a great deal of writing in recent years on the existence of a newsman's constitutional right of nondisclosure of confidential information. See, *e.g.*, Beaver, The Newsman's Code, The Claim of Privilege, and Everyman's Right to Evidence, 47 Ore. L. Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Note, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources of Information, 24 Vand. L. Rev. 667 (1971).

[21] "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." 8 J. Wigmore, Evidence § 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial interests may be enforced against the press as againt others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. *Associated Press* v. *NLRB*, 301 U.S. 103, 132–133 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in *Cklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192–193 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946). *Associated Press* v. *United States*, 326 U.S. 1 (1945), similarly overruled assertions that the First Amenment precluded application of the Sherman Act to a news gathering and disseminating organization. Cf. *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer's Publishing Co.*, 293 U.S. 268, 276 ,1934); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155–156 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943).

The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279–280 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967) (opinion of Harlan, J.,); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 277 (1971) A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. *Craig* v. *Harney*, 331 U.S. 367, 377–278 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel* v. *Rusk*, 381 U.S. 1, 16–17 (1965); *New York Times Co.* v. *United States*, 403 U.S. 713, 728–730 (1971), (STEWART, J., concurring); *Tribune Review Publishing Co.* v. *Thomas*, 254 F. 2d 883, 885 (CA 1958); *In the Matter of United Press Anns.* v. *Valente*, 308 U.Y. 71, 77, 123 N. E. 2d 777, 778 (1954). In *Zemel* v. *Rusk*, *supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "rendered less than wholly free the flow of information concerning that country." *Id.*, at 16. The ban on travel was held constitutional, for "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.*, at 17.[22]

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), for example, the Court reversed

---

gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confifidence. See *Bulstrod* v. *Letchmere*, 22 Eng. Rep. 1019 (1676); *Lord Grey's Trial*, 9 How. St. Tr. 127 (1682).

[22] "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right." 381 U.S., at 16–17.

a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.*, at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.*, at 361. See also *Estes* v. *Texas*, 381 U. S. 532, 539–540 (1965); *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, *e. g.*, *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124 (1897); *Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911); *Clein* v. *State*, 52 So. 2d 117 (Fla. 1950); *In re Grunow*, 84 N. J. L. 235, 85 A. 1011 (1913); *People ex rel. Mooney* v. *Sheriff*, 269 N. Y. 291, 199 N. E. 415 (1936); *Joslyn* v. *People*, 67 Col. 297, 184 P. 375 (1919); *Adams* v. *Associated Press*, 46 F. R. D. 439 (SD Tex. 1969); *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (Mass. 1957). See generally Annot., 7 A. L. R. 3d 591 (1966). In 1958, a newsgatherer asserted for the first time that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, *Garland* v. *Torre*, 259 F. 2d 545 (CA2), cert. denied, 358 U. S. 910 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then, although there are occasional dicta that, in circumstances not presented, a newsman might be excused. *In re Goodfader*, 45 Haw. 317, 367 P. 2d 472 (1961); *In re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963); *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, cert denied, 392 U.S. 905 (1968); *Murphy* v. *Colorado* (Colo. Supreme Court), cert. denied, 365 U.S. 843 (1961) (unreported, discussed in *In re Goodfader*, *supra*, 45 Haw., at 366, 367 P. 2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. The opinions of the state courts in *Branzburg* and *Pappas* are typical of the prevailing view, although a few recent cases such as *Caldwell*, have recognized and given effect to some form of constitutional newsman's privilege. See *State* v. *Knops*, 49 Wis. 2d 647, 183 N. W. 2d 93 (1971) (dictum); *Alioto* v. *Cowles Communication, Inc.*, C. A. 52150 (ND Cal. 1969); *In re Grand Jury Witnesses*, 322 F. Supp. 573 (ND Cal. 1970); *People* v. *Dohrn*, Crim. No. 69–3808 (Cook County, Ill., Cir. Ct. 1970).

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury which has the dual function of determing if there is proable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.[23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and "its constitutional prerogatives are rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U.S. 420, 489 (1960) (Frankfurter, J., concurring). The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." [24] The adoption of the grand jury "in our Constitution as the sole method of preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States.[25] Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Hence the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279–281, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long standing principle that "the public has a right to every man's evidence," except for those persons protected by a constitutional common law, or statutory privilege, *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.[26]

---

[23] "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (footnote omitted).

[24] It has been held that "infamous" punishments include confinement at hard labor, *United States* v. *Moreland*, 258 U.S. 433 (1922); incarceration in a penitentiary, *Mackin* v. *United States*, 117 U.S. 348 (1886); and imprisonment for more than a year. *Barkman* v. *Sanford*, 162 F. 2d 592 (CA5), cert. denied, 332 U.S. 816 (1947). Fed. Rule Crim. Proc. 7(a) has codified these holdings: "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information."

A number of States have provided newsmen a statutory privilege of varying breadth,[27] but the majority have not done so, and none has been provided by federal statute.[28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the First Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do[29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

---

[25] Although indictment by grand jury is not part of the due process of law guaranteed to State criminal defendants by the Fourteenth Amendment, *Hurtado* v. *California*, 110 U.S. 516 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions be initiated by indictment. Spain, The Grand Jury, Past and Present: A Survey, 1 Am. Crim. L.Q. 119, 126–142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. *Ibid.*

[26] Jeremy Bentham vividly illustrated this maxim:

"Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary—they and everybody! . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320 (Bowring ed. 1843).

In *United States* v. *Burr*, 25 F. Cas. 30, 34 (Cir. Ct. D. Va. 1807) (No. 14,692d), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

[27] Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources:

Ala. Code Recompiled Tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (1967, 1970 Cum. Supp.); Ariz. Rev. Stat. Ann. § 12–2237 (1969 Supp.); Ark. Stat. Ann. § 43–917 (1964); Cal. Evid. Code Ann. § 1070 (West 1966); Ind. Ann. Stat. § 2–1733 (1968); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. § 45:1451–54 (1970 Cum. Supp.); Md. Ann. Code Art. 35, § 2 (1971); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. Tit. 93, ch. 601–2 (1964); Nev. Rev. Stat. § 48.087 (1969); N.J. Stat. Ann. Tit. 2A ch. 84A, §§ 21, 29 (Supp. 1966); N.M. Stat. Ann. § 20–1–12.1 (1953, 1967 Rev.); N.Y. Civ. Rights Law § 79–h (McKinney 1970); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. Tit. 28, § 330 (1959, 1970 Cum. Supp.).

[28] Such legislation has been introduced, however. See, *e.g.*, S. 1311, S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, H.R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, H.R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Senate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

[29] The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as "so many derogations from a positive general rule [that everyone is obligated to testify when properly summoned]" and as "obstacle[s] to the administration of justice." 8 Wigmore, On Evidence, § 2192 (McNaughton rev. 1961). His criticism that *"all privileges of exemption from this general duty are exceptional* and are therefore to be discountenanced," *id.*, at § 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, "Foreward," Model Code of Evidence 22–30 (1942); Chafee, Government and Mass Communications 496–497 (1947); ABA Committee on Improvements in the Law of Evidence, Report, 63 A.B.A. Reports 595 (1938); McCormick, On Evidence 159 (1972); Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?," 52 Yale L.J. 607 (1943; Ladd, "Privileges," 1969 Law and the Social Order 555, 556 (1969); 58 Am. Jur., Witnesses § 546 (1948); 97 C.J.S., Witnesses § 259

This conclusion itself involves no restraint on what newspapers may publish or on the type of quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of *all* confidential news sources fall into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate otherwise valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens though reprehensible conduct forbidden to all other persons. To assert the contrary proposition

> "is to answer it, since it involves in its very statement the contention that the freedom of the press is a freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, 419–420 (1918).[30]

Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that

---

(1957); *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378 (CA2 19[illegible]) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Evidence (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. [illegible]) have included a newsman's privilege.

[30] The holding in this case involved a construction of the Contempt Act of 1831, 4 Stat. 487, which permitted summary trial of contempts "so near [to the court] as to obstruct the administration of justice." The Court held that the Act required only that the conduct have a "direct tendency to prevent and obstruct the discharge of judicial duty." 247 U.S., at 419. This view was overruled and the Act given a much narrower reading in *Nye* v. *United States*, 313 U.S. 33, 47–52 (1941). See *Bloom* v. *Illinois*, 391 U.S. 194, 205–206 (1968).

the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data indicates that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas,[31] but the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees.[33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group which relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and [illegible] thus deterring the commission of such crimes in the future.

---

[31] Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash which detail the experiences of such journalists after they have been subpoenaed. R., at 22–61.

[32] Cf., *e.g.*, the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, "The Constitutional Argument for Newsmen Concealing their Sources," 64 Nw. U. L. Rev. 18, 57 (1969). A number of editors of daily newspapers of varying circulation were asked the question, "Excluding one- or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate." Answers varied significantly *e.g.*, "Virtually innumerable," Tucson Daily Citizen (41,969 daily circ.), "Too many to remember," Los Angeles Herald-Examiner (718,221 daily circ.), "Occasionally," Denver Post (252,084 daily circ.), "Rarely" Cleveland Plain Dealer (370,499 daily circ.), "Very rare, some politics," Oregon Journal (146,403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

[33] In his Press Subpoenas: An Empirical and Legal Analysis 6–12 (1971), Prof. Blasi discusses these methodological problems. Prof. Blasi's survey found that slightly more than half of the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. *Id.*, at 21. Of this [illegible] of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. *Id.*, at 53.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the "hue and cry" and report felonies to the authorities.[34] Misprision of a felony—that is, the concealment of a felony "which a man knows but never assented to . . . [so as to become] either principal or accessory, " 4 Blackstone, Commentaries, c. 9, *121 (Lewis ed. 1902), was often said to be a common law crime.[35] The first Congress passed a statute, 1 Stat. 113, as amended, 35 Stat. 1114, 62 Stat. 684, which is still in effect, defining a federal crime of misprison:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be [guilty of misprison]." 18 U.S.C. § 4.[36]

It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigating the duty of a citizen whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests. As Justice Black declared in another context, "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But:—

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. *Roviaro* v. *United States*, *supra*, at 60–61, 62; *McCray* v. *Illinois*, 386 U.S. 300, 310 (1967); *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968); *Alford* v. *United States*,

---

[34] See Statute of Westminister the First, 3 Edw. I, c. IX, at 43 (1275); Statute of Winchester, 13 Edw. I, c. VI, at 114–115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, § 8(1); 4 Blackstone, Commentaries, c. 21, *293–*295 (Lewis ed. 1902); 2 Holdsworth, History of English Law 80–81, 101–102 (3d ed. 1927); 4 *ibid.*, at 521–522.

[35] See, *e.g.*, *Scrope's Case*, 3 Co. Inst. 36 (1415); *Rex* v. *Couper*, 87 Eng. Rep. 611 (1696); Proceedings under a Special Commission for the County of York, 31 Stat. Tr. 969 (1913); *Sykes* v. *Director of Public Prosecutions*, 3 W. L. R. 371 (1961). But see Glazebrook, Misprison of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189 (1964). See also Act 5 and 6 Edw. VI, c. 11 (1512).

[36] This statute has been construed, however, to require both knowledge of a crime and some affirmative act of concealment or participation. *Bratton* v. *United States*, 73 F. 2d 795 (CA10 1934); *United States* v. *Farrar*, 38 F. 2d 515, 516 (Mass. 1930), aff'd on other grounds, 281 U.S. 613 (1930); *United States* v. *Norman*, 391 F. 2d 212 (CA6 1968), cert. denied, 390 U.S. 1014 (1968); *Lancey* v. *United States*, 356 F. 2d 407 (CA9), cert. denied, 385 U.S. 922 (1966). Cf. *Marbury* v. *Brooks*, 7 Wheat. 556, 575 (1822) (Marshall, C. J.).

282 U.S. 687, 693 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this it not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.[37]

It is said that currently press subpoenas have multiplied,[38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

The argument for such a constitutional privilege rests heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19. We do not deal, however, with a governmental institution that has abused its proper function, as a legislative committee does when it "expose[s] for the sake of exposure." *Watkins* v. *United States*, 354 U.S. 178, 200 (1957). Nothing in the record indicates that these grand juries were "prob[ing] at will and without relation to existing need." *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966). Also, there is no attempt here by the grand juries to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose which is not germane to the determination of whether crime has been committed, cf. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed. Rule Crim. Proc. 6(e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. *Costello* v. *United States*, 350 U.S. 359, 364 (1956).

The requirements of those cases, see n. 18, *supra*, which hold that a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock*, *supra*, at 525. If the test is that the Government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson* v. *Florida Investigation Committee*, 372 U.S. 439, 546 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others—because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

---

[37] Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, *e.g.*, *Siebert & Ryniker*, Editor and Publisher 36–37 (Sept. 1, 1934); Bird & Mervin, The Newspaper and Society 567 (1942). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md. Ann. Code Art. 35, § 2 (1971).

[38] A list of recent subpoenas to the news media is contained in the appendix to the brief of *amicus* New York Times in No. 70–57.

Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area, . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone*, 429 F. 2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States*, *supra*, at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made:

> "It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who will be indicted." *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906).

See also *Hendricks* v. *United States*, 223 U.S. 178 (1912); *Blair* v. *United States*, *supra*, at 282–283. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.[39] For them, it would appear that only an absolute privilege would suffice.

---

[39] "Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege." Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L. J. 317, 341 (1970).

In re Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970), illustrates the impact of this *ad hoc* approach. Here, the grand jury was as in *Caldwell*, investigating the Black Panther Party, and was "inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U.S.C. § 1751), to free him from threats (18 U.S.C. § 871), to protect our armed forces from unlawful interference (18 U.S.C. § 2387), conspiracy to commit the foregoing offenses (18 U.S.C. § 371), and related statutes prohibiting acts directed against the security of the government." *Id.*, at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalists' privilege. The District Court order entered a protective order, allowing them to refuse to divulge confidential information until the Government demonstrated "a compelling and overriding national interest in requiring the testimony of [the witnesses] which cannot be served by any alternative means." *Id.*, at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts which the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify: "The whole point of the investigation is to identify persons known to the [witnesses] who

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. *In re Grand Jury Witnesses*, 322 F. Supp. 573, 574 (ND Cal. 1970). Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *City of Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[40]

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporters' appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment which a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashhion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First

---

may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court, without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court.'" *Id.*, at 577.

Another illustration is provided by *State* v. *Knops*, 49 Wis. 2d 647, 183 N.W. 2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an "underground" newspaper, the Madison Kaleidoscope, printed a front-page story entitled "The Bombers Tell Why and What Next—Exclusive to the Kaleidoscope." An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: "[Appellant] faces five very narrow and specific questions, all of which are founded on information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks." 49 Wis. 2d, at 658, 183 N.W. 2d., at 98–99.

[40] Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such "sham" newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–270 (1964); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684, 689 (1959); *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries—prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials.[41] These rules are a major step in the direction petitioners desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.[42] Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

III

We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in *United States* v. *Caldwell*, No. 70–57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is *a fortiori* true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some "compelling need" for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

The decisions in No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs* must be affirmed. Here, petitioner refused to answer questions that directly related to criminal conduct which he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute, Ky. Rev. Stat. § 218.010(14), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky. Rev. Stat. § 218.210. It held that petitioner "saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish." in *Branzburg* v. *Pound*, 461 S. W. 2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story which forms the basis of the subpoena in *Branzburg* v. *Meigs*. In both cases, if what petitioner wrote was true, he had direct information to provide the grand jury concerning the commission of serious crimes.

---

[41] The "Guidelines for Subpoenas to the News Media" were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo No. 692 (September 2, 1970), which was sent to all United States attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that "The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weight that limiting effect against the public interest to be served in the fair administration of justice" and that "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press and require the express authorizing of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is "sufficient reason to believe that the information sought [from the journalist] is essential to a successful investigation," and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in "emergencies and other unusual situations," subpoenas may be issued which do not exactly conform to the Guidelines.

[42] Cf. *Younger* v. *Harris*, 401 U.S. 37, 49, 43–54 (1971).

The only question presented at the present time in *In the Matter of Paul Pappas*, No. 70–94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as "meager," and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to "the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probably testimony." ——— Mass. ———, 266 N. E. 2d, at 303–304.

So ordered.

MR. JUSTICE DOUGLAS would reverse the judgments in *Branzburg* v. *Hayes* and *In the Matter of Pappas* for the reasons stated in his dissent in *United States* v. *Caldwell, post* ——.

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, and 70–57

(70–85)

PAUL M. BRANZBURG, PETITIONER, *v.* JOHN P. HAYES, JUDGE, ETC., ET AL.

On Writ of Certiorari to the Court of Appeals of Kentucky

(70–94)

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

(70–57)

UNITED STATES, PETITIONER *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles which should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of informa- historic independence of the press by attempting to annex the journalistic protection of a free press, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250; *New*

York Times v. *Sullivan*, 376 U.S. 254, 269,[1] because the guarantee is "not for the benefit of the press so much as for the benefit of us all." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389.[2]

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised,[3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press "has been a mighty catalyst in awakening interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences. . . ." *Estes* v. *Texas*, 381 U.S. 532, 539; *Mills* v. *Alabama*, 384 U.S. 214, 219; *Grosjean, supra*, at 250. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constituional democracy. *Grosjean, supra*, at 250; *New York Times, supra*, at 270.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, *Near* v. *Minnesota*, 283 U.S. 697; *New York Times* v. *United States*, 403 U.S. 713, a right to distribute information, see, *e.g.*, *Lovell* v. *Griffin*, 303 U.S. 444, 452; *Marsh* v. *Alabama*, 326 U.S. 501; *Martin* v. *City of Struthers*, 319 U.S. 141; *Grosjean, supra*, and a right to receive printed matter, *Lamont* v. *Postmaster General*, 381 U.S. 301.

No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. *Zemel* v. *Rusk*, 381 U.S. 1.[4] Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971). As Madison wrote: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both." 6 Writings of James Madison 398 (Hunt ed. 1906).

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality—the promise or understanding that names or certain aspects of communications will be kept off-the-record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) the existence of an unbridled subpoena power—the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.

---

[1] We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press. See, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 369; *De Jonge* v. *Oregon*, 299 U.S. 353, 365; *Smith* v. *California*, 361 U.S. 147, 153.

[2] As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.

"The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, as the attorney-client and physician-patient relationships. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant *per see*, but rather in creating conditions in which information possessed by news sources can reach public attention." Note, 80 Yale L. J. 317, 343 (1970) (footnotes omitted) (hereinafter "Yale Note").

[3] See generally Z. Chafee, Free Speech in the United States (1941). A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

[4] In *Zemel* v. *Rusk*, 381 U.S. 1, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the "weightiest considerations of national security" and we concluded that the "right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.*, at 16–17 (emphasis supplied). The necessary implication is that some right to gather information does exist.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called "news" is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of "newsmakers."[5]

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. *Talley* v. *California*, 362 U. S. 60, 65; *Bates* v. *City of Little Rock*, 361 U. S. 147; *NAACP* v. *Alabama*, 357 U. S. 449.[6]

In *Caldwell*, the District Court found that "confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing news."[7] Commentators and individual reporters have repeatedly noted the importance of confidentiality.[8] And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news-gathering.[9]

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to "self-censorship." *Smith v. California*, 361 U.S. 147, 149–154; *New York Times v. Sullivan*, 376 U.S. 254, 279. The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A. B. A. J. (1965). See also Part II, *infra*.

---

[5] In *Caldwell* v. *United States*, 434 F. 2d 1081, the Government claimed that Caldwell need not maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But as the Court of Appeals for the Ninth Circuit correctly observed:

"It is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view. The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, *e.g., Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940)." *Id.*, at 1084–1085.

[6] As we observed in *Talley* v. *California*, 362 U.S. 60, "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.*, at 64–65. And in *Lamont* v. *Postmaster General*, 381 U.S. 301, we recognized the importance to First Amendment values of the right to receive information anonymously.

[7] *Application of Caldwell*, 311 F. Supp. 358, 361.

[8] See, *e.g.*, F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74–75 (1969); H. Klurfield, Behind the Lines: The World of Drew Pearson 50, 52–55 (1968); A. Krock, Memoirs: Sixty Years on the Firing Line 181, 184–185 (1968); E. Larsen, First with the Truth 22–23 (1968); R. Ottley, The Lonely Warrior—The Life and Times of Robert S. Abbott 143–145 (1955); C. L. Sulzberger, A Long Row of Candles, Memoirs and Diaries 24, 241 (1969).

As Walter Cronkite, a network television reporter, said in an affidavit in *Caldwell*: "In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and equally important in assessing the importance and analyzing the significance of public events."

[9] See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18 (1969); Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20–29 (1972) (hereinafter, "Blasi").

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption on other governmental wrong-doing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risks by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [10] and impairing his resourcefulness as a reporter if he discloses confidential information.[11]

Again, the common sense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in *Caldwell*.[12] Individual reporters [13] and commentators [14] have noted such effects. Surveys have verified that an unbridled subpoena power will substantially impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.[15] And the Jusitce Department has recognized that "compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights." [16] *No* evidence contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioners in *Caldwell* or by the respondents in *Branzburg* and *Pappas*.

The impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationships do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or impairment of First Amendment activity) and (2) whether the effect would occur with some regularity, *i.e.*, would not be *de minimis*. See, *e.g.*, *Grosjean*, *supra*, at 244-245; *Burstyn* v. *Wilson*, 342 U.S. 495, 503; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 248; *NAACP* v. *Alabama*, 357 U.S. 449, 461–466; *Smith* v. *California*, 361 U.S. 147, 150–154; *Bates* v. *City of Little Rock*, 361 U.S. 516, 523–524; *Talley* v. *California*, 362 U.S. 60, 64–65; *Shelton* v. *Tucker*, 364 U.S. 479, 485–486; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; 286; *NAACP* v. *Button*, 371 U.S. 415, 431–438; *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539, 555–557; *New York Times* v. *Sullivan*, 376 U.S. 254, 277–278; *Freedman* v. *Maryland*, 380 U.S. 51, 59; *DeGregory* v. *New Hampshire Attorney General*, 383 U.S. 825; *Elfbrandt* v. *Russell*, 384 U.S. 11, 16–19. And, in making this determination, we have shown a special solicitude towards the "indispensable liberties" protected by the First Amendment. *NAACP* v. *Alabama*, 371 U.S., at 461; *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 66, for "freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates*, *supra*, at 523.[17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether there is an unconstitutional infringement of First Amendment freedoms.

---

[10] The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "Newspaper men shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies." G. Bird and F. Mervin, The Newspaper and Society 567 (1942).

[11] Obviously if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert and Ryniker, Editor and Publisher, September 1, 1934, 36–37.

[12] The court found that "compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish news." *Application of Caldwell*, 311 F. Supp. 358, 361.

[13] See n. 8, *supra*.

[14] Recent commentary is nearly unanimous in urging either an absolute or qualified newsman's privilege. See, *e.g.*, Goldstein, Newsmen and Their Confidential Sources, New Republic, March 21, 1970, 13–14; Note, 80 Yale L. J. 317 (1970); Note, N. Y. U. L. Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); Note, 71 Col. L. Rev. 838 (1971); Comment, 4 Journal of Law Reform 85 (1971); Comment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 119 (1970); Comment, 58 Calif. L. Rev. 1198 (1970). But see the Court's opinion, *ante*, at 24, n. 29. And see generally articles collected in Yale Note, n. 2.

Recent decisions are in conflict both as to the importance of the deterrent effects and, *a fortiori*, as to the existence of a constitutional right to a confidential reporter-source relationship. See the Court's opinion, *ante*, at 20, and cases collected in Yale Note, at 318, n. 6–7.

[15] See Blasi 6–71; Guest and Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. L. Rev. 18, 43–50 (1969).

[16] Department of Justice Memo No. 692, September 2, 1970.

For example, in *NAACP* v. *Alabama*, 357 U.S. 449, we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP "is likely to affect adversely the ability [of the NAACP] and its members to pursue their beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.*, at 463. In *Talley*, *supra*, we held invalid a city ordinance which forbade circulation of any handbill that did not have the distributor's name on it, for there was "no doubt that such an identification procedure would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.*, at 64–65. And in *Burstyn*, *supra*, we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. *Id.*, at 503.

Surely the analogous claim of deterrance here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim "speculative." See *ante*, at 28. The deterrence may not occur in every confidential relationship between a reporter and his source.[18] But it will certainly occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal—and therefore unattainable—imprimatur from empirical studies.[19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships.[20]

---

[17] Although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws or nondiscriminatory taxation, *ante*, at 17, these decisions were concerned "only with restraints on certain business or commercial practices of the press." *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139. And due weight was given to First Amendment interests. For example, the "First Amendment far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary." *Associated Press* v. *United States*, 326 U.S. 1, 20.

[18] The fact that *some* informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not *always* be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large (compared to the total "universe" of potential informants, there will remain a large number of people in "absolute" terms who *will* be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

[19] Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

[20] See, *e.g.*, the uncontradicted evidence presented in affidavits from newsmen in *Caldwell*, Appendix to No. 70–57, at 22–61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble,

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively. The grand jury serves two important functions: "to examine into the commission of crimes" and "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale* v. *Henkel*, 201 U.S. 43, 59. And to perform these functions the grand jury must have available to it every man's relevant evidence. See *Blair* v. *United States*, 250 U.S. 273, 281; *Blackmer* v. *United States*, 284 U.S. 421, 438.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment,[21] the Fourth Amendment,[22] and the evidentiary privileges of the common law.[23] So it was that in *Blair*, *supra*, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that "some confidential matters are shielded from considerations of policy, and perhaps in other cases for *special reasons* a witness may be excused from telling all he knows." *Id.*, at 281 (emphasis supplied). And in *United States* v. *Bryan*, 393 U.S. 323, the Court observed that any exemption from the duty to testify before the grand jury "presupposes a very real interest to be protected." *Id.*, at 331–332.

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the newsmen or his informant, nor even, at bottom, for the First Amendment interests of either partner in the newsgathering relationship.[24] Rather it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan*, 376 U.S., at 270.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their "delicate and vulnerable" nature, *NAACP* v. *Button*, 371 U.S. 415, 433, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association.[25] In no previous case have we considered the extent to which the First Amendment limits the grand jury subpoena power. But the Court has said that the "Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be com-

---

Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

[21] See *Blau* v. *United States*, 340 U.S. 159; *Quinn* v. *United States*, 349 U.S. 155; *Curcio* v. *United States*, 354 U.S. 118; *Malloy* v. *Hogan*, 378 U.S. 1.

[22] See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

[23] See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughton ed. 1961).

[24] Although there is a longstanding presumption against creation of common law testimonial privileges, *United States* v. *Bryan*, 339 U.S. 323, 331, these privileges are grounded in an "individual interest which has been found . . . to outweigh the public interest in the search for truth" rather than in the broad public concerns which inform the First Amendment. *Id.*, at 331.

[25] The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving police informers, see *Roviaro* v. *United States*, 353 U.S. 53, *United States* v. *Ventresca*, 380 U.S. 102, 108, *Aguilar* v. *Texas*, 378 U.S. 108, 114, *McCray* v. *Illinois*, 386 U.S. 300, and military and state secrets, *United States* v. *Reynolds*, 345 U.S. 1.

pelled to give evidence against themselves. They cannot be subjected to unreasonable searches and seizures. Nor can the First Amendment freedoms of speech, press . . . or political speech and association be abridged." *Watkins* v. *United States*, 354 U.S. 178, 188. And in *Sweezy* v. *New Hampshire*, 354 U.S. 234, it was stated: "it is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Id.*, at 245 (plurality opinion).

The established method of "carefully" circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have "consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can jusify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. And "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the state *show a substantial relation between the information sought and a subject of overriding and compelling state interest.*" *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546 (emphasis supplied). See also *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *NAACP* v. *Alabama*, 357 U. S. 449; *Sweezy*, *supra*; *Watkins*, *supra*.

Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of "compelling and overriding importance" but it must also "convincingly" demonstrate that the investigation is "substantially related" to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. *Watkins*, *supra*; *Sweezy*, *supra*.[26] They must demonstrate that it is reasonable to think the witness in question has that information. *Sweezy*, *supra*; *Gibson*, *supra*.[27] And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties. *Shelton* v. *Tucker*, 364 U. S. 479, 488; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296–297.[28]

These requirements, which we have recognized in decisions involving legislative and evecutive investigations, serve established policies reflected in numerous First Amendment decisions arising in other contexts. The requirements militate against vague investigations which, like vague laws, create uncertainty and needlessly discourage First Amendment activity.[29] They also insure that a legitimate governmental purpose will not be pursued by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, *supra*, at 488.[30] As we said in *Gibson*, *supra*, "Of course, a legislative investigation—as any investigation—must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." *Id.*, at 557.

---

[26] As we said in *Watkins* v. *United States*, 354 U.S. 178:
"[W]hen First Amendment rights are threatened, the delegation of power to the [legislative] committee must be clearly revealed in its charter. . . . It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating commitee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." *Id.*, at 198–201.

[27] We noted in *Sweezy* v. *Hampshire*, 354 U.S. 234:
"The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. *There was nothing to connect the questioning of the petitioner with this fundamental interest of the state.*" *Id.*, at 251 (emphasis supplied).

[28] See generally Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

[29] See *Watkins*, *supra*, at 208–209. See generally *Baggett* v. *Bullitt*, 377 U.S. 360, 372; *Speiser* v. *Randell*, 357 U.S. 513, 526; *Ashton* v. *Kentucky*, 384 U.S. 195, 200–201; *Dombrowski* v. *Pfister*, 380 U.S. 479, 486; *Smith* v. *California*, 361 U.S. 147, 150–152 (1959); *Winters* v. *New York*, 333 U.S. 507; *Stromberg* v. *California*, 283 U.S. 359, 369. See also Note, The Chilling Effect in Constitutional Law, 69 Col. L. Rev. 808 (1969).

[30] See generally *Zwickler* v. *Koota*, 389 U.S. 241, 249–250, and cases cited therein; *Coates* v. *Cincinnati*, 402 U.S. 611, 616; *Cantwell* v. *Connecticut*, 310 U.S. 296, 307; *De Jonge* v. *Oregon*, 299 U.S. 353, 364–365; *Schneider* v. *State*, 308 U.S. 147, 164; *Cox* v. *Louisiana*, 379 U.S. 559, 562–564 (1965). Cf. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). See also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see, *e.g.*, *United States* v. *Rumely*, 345 U.S. 41, 43; *Barenblatt* v. *United States*, 360 U.S. 109, 111-112, for the "power of Congress to conduct investigations is broad . . . [encompassing] surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them." *Watkins*, *supra*, at 187. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth which legislative investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361, *Hendricks* v. *United States*, 223 U.S. 178, 184, *United States* v. *Johnson*, 319 U.S. 503, and since standards of materiality and relevance are greatly relaxed. *Holt* v. *United States*, 218 U.S. 245; *United States* v. *Costello*, 350 U.S. 359. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590, 591-592 (1961).[31] For, as the United States notes in its brief in *Caldwell*, the grand jury "need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless."

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law;[32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[33]

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

B

The crux of the Court's rejection of any newsman's privilege is its observation that only "where news sources themselves are implicated in crime or possess information *relevant* to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." See *ante*, at 25 (emphasis supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those "confidential informants involved in actual criminal conduct" and those having "information suggesting illegal conduct by others." See *ante*, at 25, 27. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information which is clearly relevant to a specific probable violation of criminal law.[34]

---

[31] In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. *Blair* v. *United States*, 417 F. 2d 384, cert. denied, 399 U.S. 935. Nor is counsel permitted to be present to aid a witness. See *In re Groban*, 352 U.S. 330.

See generally Younger, The Grand Jury Under Article III, 46 Crim. L.C. & P.S. 214 (1955); Note, 104 U. Pa. L. Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N.C. L. Rec. 290 (1959); Whyte, "Is the Grand Jury Necessary," 45 Va. L. Rev. 469 (1959); Note, 2 Col. L. and Soc. Prob 58 (1965); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965); Orfield, The Federal Grand Jury, 22 F.R.D. 343.

[32] The standard of proof employed by most grand juries, federal and State, is simply "probable cause" to believe that the accused has committed a crime. See Note, 1963 Wash. U. L. Q. 102; L. Hall *et al.*, Modern Criminal Procedure 793-794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. *Cf. Costello* v. *United States*, 350 U.S. 359; *Beck* v. *Washington*, 369 U.S. 541.

[33] *Cf. Garland* v. *Torre*, 259 F. 2d 545. The Second Circuit Court of Appeals declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: "It is to be noted that we are not dealing here with the use of judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked went to the heart of the plaintiff's claim." *Id.*, at 549-550 (citations omitted).

Similarly, a reporter may have information from a confidential source which is "related" to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the "probable cause" and "alternative means" requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, *infra*.[35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.[36]

The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433.

---

[34] If this requirement is not met, then the government will basically be allowed to undertake a "fishing expedition" at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful "probable cause" requirement. See *ante*, at 35–36. As the Court states, a grand jury investigation "may be triggered by tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Ante*, at 36. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify.

The Court fails to recognize that under the guise of "investigating crime" vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

[35] We need not, therefore, reach the question of whether government's interest in these cases is "overriding and compelling." I do not, however, believe, as the Court does, that *all* grand jury investigations automatically would override the newsman's testimonial privilege.

[36] The disclaimers in MR. JUSTICE POWELL'S concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of the District Court that the grand jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests "until there has been a clear showing of compelling and overriding national interest that cannot be served by alternative means." *Caldwell v. United States*, 434 F. 2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the "subject, direction or scope of the grand jury inquiry." *Id.*, at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the Unted States has not met the burden which I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18 U.S.C. § 871 (threats against the President), 18 U.S.C. § 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. § 231 (civil disorders), 18 U.S.C. § 1201 (interstate travel to incite a riot), 18 U.S.C. § 1341 (mail fraud and swindles) and other crimes which were not specified. But, with one exception, there has been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes.[37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U.S.C. § 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See *In re National Window Glass Workers*, 287 Fed. 219; *United States* v. *Dardi*, 330 F. 2d 316, 336.[38] Furthermore, the record before us does not show that Caldwell probably had any information about the violation of any other federal crimes,[39] or that alternative means of obtaining the desired information were pursued.[40]

In the *Caldwell* case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. *Caldwell v. United States*, 434 F. 2d, at 1088. On the particular facts before it,[41] the Court concluded that the very appearance by

---

[37] See Blasi, at 61 ff.

[38] After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to "set forth facts indicating the general nature of the grand jury's investigation [and] witness Earl Caldwell's possession of information relevant to this general inquiry." In detailing the basis for the belief that a crime had probably been committed, the government simply asserted that certain actions had previously been taken *by other grand juries, and by Government counsel,* with respect to certain members of the Black Panther Party (*i.e.,* immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, "The Black Panther," for which Hilliard had been indicted before Caldwell was subpoenaed.

[39] In its affidavits, the government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and December 14). On December 14, 1969, Caldwell wrote:

"We are special, Mr. Hilliard said recently. We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.

"In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns.

"Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles."

In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicate that he *probably* had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an indictment had already been brought on that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs—beliefs which were readily available to the Government through other sources, like the party newspaper.

[40] The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

[41] In an affidavit filed with the District Court, Caldwell stated:

"I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very

Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public:[42]

> "Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.
>
> "If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here." *Caldwell*, *supra*, at 1089.

I think this ruling was also correct in light of the particularized circumstances of the *Caldwell* case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his newsgathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles.[43] Since the United States has not attempted to refute this assertion, the appearance of Caldwell would on these facts, indeed be a "barren performance." But *this* aspect of the *Caldwell* judgment I would confine to its own facts. As the Court of Appeals

---

brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' and 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

[42] "Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences. . . . The Government characterizes this anticipated loss of communication as Black Panther reprisal. . . . But it is not an extortionate threat that we face. It is a human reaction as reasonable to expect as that a client will leave a lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion." *Caldwell* v. *United States*, 434 F. 2d 1088.

[43] Caldwell stated in his affidavit filed with the District Court, see n. 40, *supra*:

"It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published."

appropriately observed: "The rule of this case is a narrow one. . . ." *Caldwell, supra*, at 1090.

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70–57, *United States* v. *Caldwell.*[44] In the other two cases before us, No. 70–85, *Branzburg* v. *Hayes* and *Branzburg* v. *Meigs*, and No. 70–94, *In the Matter of Paul Pappas*, I would vacate the judgments and remand the cases for further proceedings not inconsistent with the views I have expressed in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 70–57

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

Caldwell, a Black, is a reporter for the New York Times and was assigned to San Francisco with the hope that he could report on the activities and attitudes of the Black Panther Party. Caldwell in time gained the complete confidence of its members and wrote in-depth articles about them.

He was subpoenaed to appear and testify before a federal grand jury and to bring with him notes and tapes covering interviews with its members. A hearing on a motion to quash was held. The District Court ruled that while Caldwell must appear before the grand jury, he need not reveal confidential communications unless the court was satisfied that there was a "compelling and overriding national interest." See 311 F. Supp. 358. Caldwell filed a notice of appeal and the Court of Appeals dismissed the appeal without opinion.

Shortly thereafter a new grand jury was impanelled and it issued a new subpoena for Caldwell to testify. On a motion to quash, the District Court issued an order substantially identical to its earlier one.

Caldwell refused to appear and was held in contempt. On appeal the Court of Appeals vacated the judgment of contempt. It said that the revealing of confidential sources of information jeopardized a First Amendment freedom, that Caldwell need not appear before the grand jury absent a showing that there was a "compelling or overriding national interest" in pursuing such an interrogation.

The District Court had found that Caldwell's knowledge of the activities of the Black Panthers "derived in substantial part" from information obtained "within the scope of a relationship of trust and confidence." It also found that confidential relationships of this sort are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing, and publishing the news.

The District Court further had found that compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardized those relationships and thereby impaired the journalist's ability to gather, analyze, and publish the news.

The District Court finally had found that, without a protective order delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury would severely impair and damage his confidential relationships with members of the Black Panther Party and other militants, and thereby severely impair and damage his ability to gather, analyze, and publish news concerning them; and that it would also damage and impair the abilities of all reporters to gather, analyze, and publish news concerning them.

The Court of Appeals agreed with the findings of the District Court but held that Caldwell need not appear at all before the grand jury absent a "compelling need" shown by the Government. 434 F. 2d 1081.

It is my view that there is no "compelling need" that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime. His immunity in my view is therefore quite complete, for absent his involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier. Since in my view there is no area of inquiry not protected by a privilege, the reporter need not appear for the futile purpose of invoking one to each question. And, since in my view a newsman has an absolute right not to appear before a grand jury it follows for me that a journalist who voluntarily appears before that body may invoke his First Amendment privilege to specific questions. The basic issue is the extent to which the First Amendment (which is applicable to investigating committees, *Watkins* v. *United States*, 354 U.S. 178; *NAACP* v. *Alabama*, 357 U.S. 449, 463; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U.S. 539; *Baird* v. *State Bar*, 401 U.S. 1, 6–7; *I re Stolar*, 401 U.S. 23) must yield to the Government's asserted need to know a reporter's unprinted information.

---

[44] The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden which, I think, protection of First Amendment rights requires.

The starting point for decision pretty well marks the range within which the end result lies. The New York Times, whose reporting functions are at issue here, takes the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government.[1] My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the New York Times advances in the case.

My view is close to that of the late Alexander Meiklejohn:[2]

> "For the understanding of these principles it is essential to keep clear the crucial difference between 'the rights' of the governed and 'the powers' of the governors. And at this point, the title 'Bill of Rights' is lamentably inaccurate as a designation of the first ten amendments. They are not a 'Bill of Rights' but a 'Bill of Powers and Rights.' The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed. The First and Tenth Amendments protect the governing 'powers' of the people from abridgment by the agencies which are established as their servants. In the field of our 'rights,' each one of us can claim 'due process of law.' In the field of our governing 'powers,' the notion of 'due process is irrelevant."

He also believed that "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express,"[3] and that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."[4]

Two principles which follow from this understanding of the First Amendment are at stake here. One is that the people, the ultimate governors, must have absolute freedom of and therefore privacy of their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs. In this regard, Caldwell's status as a reporter is less relevant than is his status as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint. The second principle is that effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination. In this respect, Caldwell's status as a newsgatherer and an integral part of that process becomes critical.

---

[1] "The three minimal tests we contend must be met before testimony divulging confidences may be compelled from a reporter are these: 1. The government must clearly show that there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law. 2. The government must clearly show that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter. 3. The government must clearly demonstrate a compelling and overriding interest in the information." Amicus Brief, N.Y. Times, at 29.

[2] Meiklejohn, The First Amendment Is Absolute, 1961 Sup. Ct. Rev. 245, 254.

[3] *Id.*, at 256.

[4] *Id.*, at 257.

I

Government has many interests that compete with the First Amendment. Congressional investigations to determine how existing laws actually operate or whether new laws are needed. While congressional committees have broad powers, they are subject to the restraints of the First Amendment. As we said in *Watkins* v. *United States*, 354 U. S. 178, 197: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

Hence matters of belief, ideology, religious practices, social philosophy and the like are beyond the pale and of no rightful concern of government, unless the belief or the speech or other expression has been translated into action. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Baird* v. *State Bar*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23.

Also at stake here is Caldwell's privacy of association. We have held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, 357 U. S. 449, 462; *NAACP* v. *Button*, 371 U. S. 415.

As I said in *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 565: ". . . the associational rights protected by the First Amendment . . . cover the entire spectrum in political ideology as well as in art, in journalism, in teaching, and in religion. [G]overnment is . . . precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, *regardless of the legislative purpose to be served* . . . . If that is not true, I see no barrier to investigation of newspapers, churches, political parties, clubs, societies, unions, and any other associations for their political, economic, social, philosophical, or religious vews." (Emphasis added.)

The Court has not always been consistent in its protection of these First Amendment rights and has sometimes allowed a government interest to override the absolutes of the First Amendment. For example, under the banner of the "clear and present danger" test,[5] and later under the influence of the "balancing" formula,[6] the Court has permitted men to be penalized not for any harmful conduct but solely for holding unpopular beliefs.

In recent years we have said over and again that where First Amendment rights are concerned any regulation "narrowly drawn,"[7] must be "compelling" and not merely "rational" as is the case where other activities are concerned.[8] But the "compelling" interest in regulation neither includes paring down or diluting the right, nor embraces penalizing one solely for his intellectual viewpoint; it concerns the State's interest, for example, in regulating the time and place or perhaps manner of exercising First Amendment rights. Thus one has an undoubted right to read and proclaim the First Amendment in the classroom or in a park. But he would not have the right to blare it forth from a sound truck rolling through the village at 2 a.m. The distinction drawn in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304, should still stand: "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[9]

---

[5] *E.g., Schenck* v. *United States*, 249 U.S. 47 (wartime antidraft leafleting); *Debs* v. *United States*, 249 U.S. 211 (wartime anti-draft speech); *Abrams* v. *United States*, 250 U.S. 616 (wartime leafleting calling for general strike); *Feiner* v. *New York*, 340 U.S. 315 (arrest of radical speaker without attempt to protect him from hostile audience); *Dennis* v. *United States*, 341 U.S. 494 (reformulation of test as "not improbable" rule to sustain conviction of knowing advocacy of overthrow); *Scales* v. *United States*, 367 U.S. 203 (knowing membership in group which espouses forbidden advocacy is punishable). For a more detailed account of the infamy of the "clear and present danger" test see my concurring opinion in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447.

[6] *E.g., Adler* v. *Board of Education*, 342 U.S. 485 (protection of schools from "pollution" outweighs public teachers' freedom to advocate violent overthrow); *Uphaus* v. *Wyman*, 360 U.S. 72, 79, 81 (preserving security of New Hampshire from subversives outweighs privacy of list of participants in suspect summer camp); *Barenblatt* v. *United States*, 360 U.S. 109 (legislative inquiry more important that protecting HUACS witness' refusal to answer whether a third person had been a communist); *Wilkinson* v. *United States*, 365 U.S. 399 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he was currently a member of the Communist Party); *Braden* v. *United States*, 365 U.S. 431, 435 (legislative inquiry more important than protecting HUAC witness' refusal to state whether he had once been a member of the Communist Party); *Konigsberg* v. *State Bar*, 366 U.S. 36 (regulating membership of bar outweighs interest of applicants in refusing to answer question concerning communist affiliations); *In re Anastaplo*, 366 U.S. 82 (regulating membership of bar outweighs protection of applicant's belief in Declaration of Independence that citizens should revolt against an oppressive government); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (national security outweighs privacy of association of leaders of suspect groups); *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (regulating membership of bar outweighs privacy of applicants' views on the soundness of the Constitution).

[7] Thus, we have held "overbroad" measures which unduly restricted the time, place, and manner of expression. *Schneider* v. *State*, 308 U.S. 147, 161 (anti-leafleting law); *Thornbill* v. *Alabama*, 310 U.S. 88, 102 (anti-boycott statute); *Cantwell* v. *Connecticut*, 310 U.S. 296 (breach of peace measure); *Cox* v. *Louisiana*, 379 U.S. 536 (breach of peace measure); *Edwards* v. *South Carolina*, 372 U.S. 229 (breach of peace statute); *Cohen* v. *California*, 403 U.S. 15, 22 (breach of peace statute); *Gooding* v. *Wilson*, 405 U.S. —— (breach of

Under these precedents there is no doubt that Caldwell could not be brought before the grand jury for the sole purpose of exposing his political beliefs. Yet today the Court effectively permits that result under the guise of allowing an attempt to elicit from him "factual information." To be sure, the inquiry will be couched only in terms of extracting Caldwell's recollection of what was said to him during the interviews, but the fact remains that his questions to the Panthers and therefore the respective answers were guided by Caldwell's own preconceptions and views about the Black Panthers. His entire experience was shaped by his intellectual viewpoint. Unlike the random bystander, those who affirmatively set out to test an hypothesis, as here, have no tidy means of segregating subjective opinion from objective facts.

Sooner or later any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all. As Justice Holmes noted in *Abrams* v. *United States*, 250 U.S. 616, such was the fate of the "clear and present danger" test which he had coined in *Schenck* v. *United States*, 249 U.S. 47. Eventually, that formula was so watered down that the danger had to be neither clear nor present but merely "not improbable." *Dennis* v. *United States*, 341 U.S. 494, 510. See my concurring opinion in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447. A compelling

---

peace statute). But insofar as penalizing the *content* of thought and opinion is concerned, the Court has not in recent Terms permitted any interest to override the absolute privacy of one's philosophy. To be sure, opinions have often adverted to the absence of a compelling justification for attempted intrusions into philosophical or associational privacy. *E.g.*, *Bates* v. *Little Rock*, 361 U.S. 516, 523 (disclosure of NAACP membership lists to city officials); *Gibson* v. *Florida Legislative Investigating Committee*, 372 U.S. 539, 546 (disclosure of NAACP membership list to state legislature); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829 (witness' refusal to state whether he had been a member of the Communist Party three years earlier); *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6–7 (refusal of bar applicant to state whether she had been a member of the Communist Party), *In re Stolar*, 401 U.S. 23 (refusal of bar applicant to state whether he was "loyal" to the government); see also *Street* v. *New York*, 394 U.S. 576 (expression of digust for flag). Yet, while the rhetoric of these opinions did not expressly embrace an absolute privilege for the privacy of opinions and philosophy, the trend of those results was not inconsistent with and in their totality appeared to be approaching such a doctrine. Moreover, in another group of opinions invalidating for overbreadth intrusions into the realm of belief and association, there was no specification of whether a danger test, a balancing process, an absolute doctrine, or a compelling justification inquiry had been used to detect invalid applications comprehended by the challenged measures. *E.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183 (loyalty test which condemned mere unknowing membership in a suspect group); *Shelton* v. *Tucker*, 364 U.S. 479 (requirement that public teachers disclose all affiliations); *Gremillion* v. *NAACP*, 366 U.S. 293, 296 (disclosure of NAACP membership lists); *Whitehall* v. *Elkins*, 389 U.S. 54, 59 (nonactive membership in a suspect group a predicate for refusing employment as a public teacher); *United States* v. *Robel*, 389 U.S. 258 (mere membership in Communist Party a sole ground for exclusion from employment in defense facility). Regrettably, the vitality of the overdue trend toward a complete privilege in this area has been drawn into question by quite recent decisions of the Court, *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, holding that bar applicants may be turned away for refusing to disclose their opinions on the soundness of the Constitution; *Cole* v. *Richardson*, 405 U.S. ——, sustaining an oath required of public employees that they will "oppose" a violent overthrow; and, of course, by today's decision.

[8] Where no more than economic interests were affected this Court has upheld legislation only upon a showing that it was "rationally connected" to some permissible state objective, only upon a showing that it was "rationally connected" to some permissible state objective. *E.g.*, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152; *Goesaert* v. *Cleary*, 335 U.S. 464; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *McGowan* v. *Maryland*, 366 U.S. 420; *McDonald* v. *Board of Election Comm'rs.*, 394 U.S. 802; *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4; *Richardson* v. *Belcher*, 404 U.S. 78; *Schilb* v. *Keubel*, 404 U.S. 357.

[9] The majority cites several cases which held that certain burdens on the press were permissible despite incidental burdens on its newsgathering ability. For example, see *Sheppard* v. *Maxwell*, 384 U.S. 333, 358. Even assuming that those cases were rigidly decided, the fact remains that in none of them was the Government attempting to extract personal belief from a witness and the privacy of a citizen's personal intellectual viewpoint was not implicated.

interest test may prove as pliable as did the clear and present danger test. Perceptions of the worth of state objectives will change with the composition of the Court and with the intensity of the politics of the times. For example, in *Uphaus* v. *Wyman*, 360 U.S. 72, sustaining an attempt to compel a witness to divulge the names of participants in a summer political camp, JUSTICE BRENNAN dissented on the ground that "it is patent that there is really no subordinating interest . . . demonstrated on the part of the State." *Id.*, 106. The majority, however, found that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy . . . ." *Id.*, 81. That is to enter the world of "make believe," for New Hampshire, the State involved in *Uphaus*, was never in fear of being overthrown.

II

Today's decision will impede the wide open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.

I see no way of making mandatory the disclosure of a reporter's confidential source of the information on which he bases his news story.

The press has a preferred position in our constitutional scheme not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.

As Mr. Justice Black said in *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (concurring opinion), "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."

Government has an interest in law and order; and history shows that the trend of rulers—the bureaucracy and the police—is to suppress the radical and his ideas and to arrest him rather than the hostile audience. See *Feiner* v. *New York*, 340 U.S. 315. Yet as held in *Terminiello* v. *Chicago*, 337 U.S. 1, 4, one "function of free speech under our system of government is to invite dispute." We went on to say, "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

The people who govern are often far removed from the cabals that threaten the regime; the people are often remote from the sources of truth even though they live in the city where the forces that would undermine society operate. The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. Its performance means that the press is often engaged in projects that bring anxiety or even fear to the bureaucracies or departments or officials of government. The whole weight of government is therefore often brought to bear against a paper or a reporter.

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

It is no answer to reply that the risk that a newsman will divulge one's secrets to the grand jury is no greater than the threat that he will in any event inform to the police. Even the most trustworthy reporter may not be able to withstand relentless badgering before a grand jury.[10]

The record in this case is replete with weighty affidavits from responsible newsmen, telling how important are the sanctity of their sources of information.[11] When we deny newsmen that protection, we deprive the people of the information needed to run the affairs of the Nation in an intelligent way.

Madison said:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And, a people who mean to be their own Governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)." The Complete Madison 337 (1953).

Today's decision is more than a clog upon news gathering. It is a signal to publishers and editors that they should exercise caution in how they use whatever information they can obtain. Without immunity they may be summoned to account for their criticism. Entrenched officers have been quick to crash their powers down upon unfriendly commentators.[12] *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254; *Garrison* v. *Louisiana,* 379 U.S. 64; *Pickering* v. *Board of Education,* 391 U.S. 563; *Gravel* v. *United States, ante.*

The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.

---

[10] "The secrecy of the [grand jury's] proceedings and the possibility of a jail sentence for contempt so intimidate the witness that he may be led into answering questions which pry into his personal life and associations and which, in the bargain, are frequently immaterial and vague. Alone and faced by either hostile or apathetic grand juries, the witness is frequently undone by his experience. Life in a relatively open society makes him especially vulnerable to a secret appearance before a body that is considering criminal charges. And the very body toward which he could once look for protection has become a weapon of the prosecution. When he seeks protective guidance from his lawyer, he learns that the judicial broadening of the due process which has occurred in the past two decades has largely ignored grand jury matters, precisely because it was assumed that the grand jury still functioned as a guardian of the rights of potential defendants." Donnor & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard of Individual Rights, 214 The Nation 5, 6 (1972).

[11] It is said that "we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." But the majority need look no further than its holdings that prosecutors need not disclose informers' names because disclosure would (a) terminate the usefulness of an exposed informant inasmuch as others would no longer confide in him, and (b) it would generally inhibit persons from becoming confidential informers. *McCray* v. *Illinois,* 386 U.S. 300; *Scher* v. *United States,* 305 U.S. 251; cf. *Roviaro* v. *United States,* 353 U.S. 53.

[12] For a summary of early reprisals against the press, such as the John Peter Zenger trial, the Alien and Sedition Acts prosecutions, and Civil War suppression of newspapers, see Press Freedoms Under Pressure, Repor tof the Twentieth Century Fund Task Force on the Government and the Press 3–5 (1972). We have not outlived the tendency of officials' to retaliate against critics. For recent examples see J. Wiggins, Freedom or Secrecy 87 (1956) ("New Mexico, in 1954, furnished a striking example of government reprisal against . . . a teacher in the state reform school [who] wrote a letter to the New Mexican, confirming stories it had printed about mistreatment of inmates by guards. . . . [Two days later he] was notified of his termination."); Note, the Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885–886 (1971) (dismissal of an Air Force employee who testified before a Senate committee with respect to C–5A cargo plane cost overruns and firing of an FBI agent who wrote Senators complaining of the Bureau's personnel practices; N.Y. Times, Nov. 8, 1967, at 1, col. 2; *ibid.*, Nov 9, 1967, at 2, col. 4 (Selective Service directive to local draft boards requiring conscription of those who protested war; N.Y. Times, Nov. 11, 1971, at 95, col. 4; *ibid.*, Nov. 12, 1971, at 13, col. 1; *ibid.*, Nov. 14, 1971, at 13, col. 1 (FBI investigation of a television commentator who criticized administration policies); *ibid.*, Nov. 14, 1971, at 75, col. 3 (denial of White House press pass to underground journalist).

SUPREME COURT OF THE UNITED STATES

Nos. 70–85, 70–94, and 70–57

(70–85)

PAUL M. BRANZBURG, PETITIONER *v.* JOHN P. HAYES, JUDGE, ETC., ET AL

On Writ of Certiorari to the Court of Appeals of Kentucky

—

(70–94)

IN THE MATTER OF PAUL PAPPAS, PETITIONER

On Writ of Certiorari to the Supreme Court of Massachusetts

—

(70–57)

UNITED STATES, PETITIONER, *v.* EARL CALDWELL

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[June 29, 1972]

MR. JUSTICE POWELL, concurring in the opinion of the Court.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms—were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

---

*It is to be remembered that Caldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the government has made a showing that meets the three preconditions specified in the dissenting opinion of MR. JUSTICE STEWART. To be sure, this would require a "balancing" of interests by the Court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the Court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and the dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court—when called upon to protect a newsman from improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by the dissenting opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF THE APPLICATION OF EARL CALDWELL AND NEW YORK TIMES COMPANY FOR AN ORDER QUASHING GRAND JURY SUBPOENAS, EARL CALDWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(No. 26,025)

[November 16, 1970]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and ELY, Circuit Judges, and JAMESON, District Judge*

MERRILL, Circuit Judge:

Earl Caldwell appeals from an order holding him in contempt of court for disregard of an order directing him to appear before the Grand Jury of the United States District Court for the Northern District of California pursuant to a subpoena issued by the Grand Jury.

Appellant is a black news reporter for the New York Times. He has become a specialist in the reporting of news concerning the Black Panther Party. The Grand Jury is engaged in a general investigation of the Black Panthers and the possibility that they are engaged in criminal activities contrary to federal law.

In order to protect First Amendment interests asserted by appellant, the District Court order of attendance, which appellant disregarded, expressly granted appellant the privilege of silence as to certain matters until such time as the Government should demonstrate "a compelling and over-riding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means." This protective order provided:

> "(1) That * * * he shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination, to the public through the press or other news media.
>
> "(2) That specifically, without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given him for publication or public disclosure.
>
> "(3) That, to assure the effectuation of this order, Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury * * *."

Appellant contends that the privilege granted by the District Court will not suffice to protect the First Amendment interests at stake; that unless a specific need for his testimony can be shown by the United States he should be excused from attendance before the Grand Jury altogether. Thus it is not the scope of the interrogation to which he must submit that is here at issue; it is whether he need attend at all.

The case is one of first impression and one in which news media have shown great interest and have accordingly favored us with briefs as amici curiae. As is true with many problems recently confronted by the courts, the case presents vital questions of public policy; questions as to how competing public interests shall be balanced. The issues require us to turn out attention to the underlying conflict between public interests and the nature of such competing interests.[1]

---

*Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

[1] Where, as here, the alleged abridgement of First Amendment interests occurs as a by-product of otherwise permissible governmental action not directed at the regulation of speech or press, "resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt* v. *United States*, 360 U.S. 109, 126 (1959); see, e.g., *Konisberg* v. *State Bar*, 366 U.S. 36, 50–51 (1961); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 460–67 (1958); Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" 1964, Sup.Ct.Rev. 191, 214–16 (1964).

While the United States has not appealed from the grant of privilege by the District Court (which it opposed below) and the propriety of that grant is thus not directly involved here, appellant's contentions here rest upon the same First Amendment foundation as did the protective order granted below. Thus, before we can decide whether the First Amendment requires more than a protective order delimiting the scope of interrogation, we must first decide whether it requires any privilege at all.

THE PROTECTIVE ORDER

The proceeding below were initiated by a motion by appellant to quash subpoenas issued by the Grand Jury.[2] In his moving papers appellant's position was that the "inevitable effect of the subpoenas will be to suppress vital First Amendment freedoms of Mr. Caldwell, of the New York Times, of the news media, and of militant political groups by driving a wedge of distrust and silence between the news media and the militants, and that this Court should not countenance a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling governmental interest—not shown here—in requiring Mr. Caldwell's appearance before the Grand Jury."

Amici curiae solidly supported appellant in this position. The fact that the subpoenas would have a "chilling effect" on First Amendment freedoms was impressively asserted in affidavits of newsmen of recognized stature, to a considerable extent based upon recited experience. Appellant's own history is related in his moving papers:

> "Earl Caldwell has been covering the Panthers almost since the Party's beginnings. Initially received hesitatingly and with caution, he has gradually won the confidence and trust of Party leaders and rank-and-file members. As a result, Panthers will now discuss Party views and activities freely with Mr. Caldwell. * * * Their confidences have enabled him to write informed and balanced stories concerning the Black Panther Party which are unavailable to most other newsmen.
>
> * * * * * * *
>
> If Mr. Caldwell were to disclose Black Panther confidences to governmental officials, the grand jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with the Panthers and other militant groups. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsmen; and the news media would thereby be vitally hampered in their ability to cover the views and activities of the militants."

The response of the United States disputed the contention that First Amendment freedoms were endangered.

> "Newsmen filing affidavits herein allege that they fear, in effect, that the Black Panthers will refrain from furnishing them with news. This contention is specious. Despite some assertions by Black Panther leaders to the contrary, the Black Panthers in fact depend on the mass media for their constant endeavor to maintain themselves in the public eye and thus gain adherents and continued support. They have continued unceasingly to exploit the facilities of the mass media for their own purposes."

Assuming, arguendo, that this statement is correct, it is not fully responsive to the claim that First Amendment freedoms are endangered. The premise underlying the Government's statement is that First Amendment interests in this area are adequately safeguarded as long as potential news makers do not cease using the media as vehicles for their communication with the public. But the First Amendment means more than that. It exists to preserve an "untrammeled press as a vital source of public information," *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). Its objective is the maximization of the "spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). Thus, it is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view.

---

[2] The first subpoena was served February 2, 1970. It directed appellant to appear and testify and to bring with him notes and tape recordings of interviews reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims, purposes and activities of the organization. On March 16, after appellant had protested the scope of the subpoena, a second subpoena was served. It simply required appellant's attendance. Appellant's motion to quash was directed to both subpoenas. The court denied the motion and directed compliance with the March 16 subpoena subject to the protective order. Appellant appealed that decision; but the appeal was dismissed, apparently on the ground that the District Court order was not appealable. By then the term of the Grand Jury had expired, and a new Jury was sworn. A new subpoena ad testificandum was served on May 22, 1970. All proceedings had in connection with the earlier subpoenas were made a part of the record of the proceedings concerning this last subpoena. A new order directing attendance was issued; this order also contained the protective provisions or privilege. It is appellant's disregard of that order which resulted in the judgment of contempt now before us.

The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940).

The affidavits contained in this record required the conclusion of the District Court that "compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyse, and publish the news."

Accordingly we agree with the District Court that First Amendment freedoms are here in jeopardy.

On the other side of the balance is the scope of the Grand Jury's investigative power.

In his moving papers appellant complained that the Government had not disclosed the subject, direction or scope of the Grand Jury inquiry and that efforts of counsel to obtain some specification had been unavailing.

> "Government counsel has said only that the grand jury has 'broad investigative powers,' that he cannot 'limit the inquiry of the grand jury in advance,' and that the subject and scope of the grand jury's investigation is 'no concern of a subpoenaed witness.'"

The Government in opposing appellant's motion to quash, stated position in these terms:

> "On the basis of what he has written, directly quoting statements made to him for publication by spokesmen for the Black Panther Party, Earl Caldwell obviously can give and should come forward with evidence which will be helpful to the Grand Jury in its inquiry."

Thus, as is true in innumerable instances, the Grand Jury does not know what it wants from this witness. It wants to find out what he knows that might shed light on the general problem it is investigating. This type of wideranging, open-ended inquiry is, of course, typical of many Grand Jury proceedings. See Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Note, "The Grand Jury as an Investigatory Body," 74 Har.L.Rev. 590, 591–92 (1961). If the privilege of silence as defined by the District Court is made available to news gatherers, the Grand Jury will be deprived of their assistance as witnesses in such general investigations.

The question posed below was whether, as a matter of law, this loss to the Grand Jury, this impediment to its traditionally broad scope of inquiry, outweighs the injury to First Amendment freedoms.

The Government stresses the historic traditions of the Grand Jury with its extensive powers of investigation, see, e.g., Hale v. Henkel, *supra*, and the corresponding duty of the citizenry to come before the Grand Jury to give testimony. United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950); Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). But these general propositions of Government authority necessarily are tempered by constitutional prohibitions and other exceptional circumstances. See United States v. Bryan, *supra*, 339 U.S. at 331, 70 S.Ct. 724, 94 L.Ed. 884; Blair v. United States, *supra*, 250 U.S. at 281–282, 39 S.Ct. 468, 63 L.Ed. 979. In this respect we find guidance in the Supreme Court decisions regarding conflicts between First Amendment interests and legislative investigatory needs;[3] the Court has required the sacrifice of First Amendment freedoms only where a compelling need for the particular testimony in question is demonstrated.[4]

---

[3] Like the Grand Jury, legislative committees have long been viewed as invaluable instruments of goverance. *See, e.g., Barenblatt* v. *United States*, 360 U.S. 109, 111, 79 S. Ct. 1081, 3 L.Ed. 2d 1115 (1959); *United States* v. *Rumely*, 345 U.S. 41, 43, 73 S. Ct. 543, 97 L. Ed.

[4] *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*,

If the Grand Jury may require appellant to make available to it information obtained by him in his capacity as news gatherer, then the Grand Jury and the Department of Justice have the power to appropriate appellant's investigative efforts to their own behalf—to convert him after the fact into an investigative agent of the Government. The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes. To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function.[5] To accomplish this where it has not been shown to be essential to the Grand Jury inquiry simply cannot be justified in the public interest.

Further it is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship. See *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964); *Smith* v. *California*, 361 U.S. 147 (1959).

It was on such considerations as these that the balance was struck by the District Court. It ruled:

> "When the exercise of the grand jury power of testimonial compulsion so necessary to the effective functioning of the court may impinge upon or repress First Amendment rights or freedom of speech, press and association, which centuries of experience have found to be indispensable to the survival of a free society, such power shall not be exercised in a manner likely to do so until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means."

Finding that the Government had shown no compelling or overriding national interest for testimony of the sort specified, the District Court imposed the limits we have set forth earlier in this opinion. It reserved jurisdiction to modify its order on a showing of such governmental interest which cannot be served by means other than by appellant's testimony.

We agree with the District Court that the First Amendment requires this qualified privilege, and we find nothing unreasonable in the terms in which it was there defined.[6]

ATTENDANCE

We have noted, the issue upon this appeal goes beyond the question of a privilege to decline to respond to interrogation in certain areas. The District Court ruled that, although protected by its limited privilege, Caldwell was required to respond to the subpoena by appearing before the Grand Jury to answer questions not privileged. Appellant contends that his mere appearance before the Grand Jury will result in loss of his news sources. The Government questions this result.

---

357 U.S. 449, 460–67 (1958); *Sweezy* v. *New Hampshire*, 354 U.S. 235 (1957); *Watkins* v. *United States*, 354 U.S. 178 (1957); *United States* v. *Rumely*, 345 U.S. 41 (1953). It is necessary that, as the investigation proceeds, step-by-step, "an adequate foundation for inquiry must be laid." *Gibson* v. *Florida Legislative Investigation Committee*, *supra*, at 557.

[5] It is a paradox of the Government's position that, if groups like the Black Panthers cease taking reporters like appellant into their confidence, these journalists will, in the future, be unable to serve a public function either as news gatherers or as prosecution witnesses.

[6] *Garland* v. *Torre*, 259 F.2d 545 (2d Cir.) cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), is not to the contrary. That case involved a libel suit in which an author attributed alleged defamatory remarks reported by her to a "network executive." The author, when called as a witness in the libel action against the network, claimed a First Amendment privilege not to disclose the informant's identity and was held in contempt for her refusal to divulge the source.

The Second Circuit (per Judge, now Mr. Justice, Stewart) affirmed the judgment of contempt. But, in doing so, it accepted the proposition "that compulsory disclosure of confidential sources of information may entail an abridgement of press freedom * * *" Id., at 548. The test was "whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." Id. In that case the court noted that it was "not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news nor with a case where the identity of the news source is of doubtful relevance or materiality." Id., at 549–550. There the information was essential for the trial of plaintiff's case; "the question asked of appellant went to the heart of plaintiff's claim." Id. Thus an over-riding need for the specific testimony was shown.

The affidavits on file cast considerable light on the process of gathering news about militant organizations.[7] It is apparent that the relationship which an effective privilelge in this area must protect is a very tenuous and unstable one. Unlike the relation between an attorney and his client or a physician and his patient, relationships between journalists and news sources like the Panthers are not rooted in any service the journalist can provide his informant apart from the publication of the information obtained. Goldstein, "Newsmen and their Confidential Sources," New Republic 13 (March 21, 1970). The relationship depends on trust and confidence that is constantly subject to reexamination and that depends in turn on actual knowledge of how news information imparted have been handled and on continuing reassarance that the handling has been discreet.[8]

This reassurance disappears when the reporter is called to testify behind closed doors. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainty in the minds of those who fear a betrayal of their confidences. These uncertainties are compounded by the subtle nature of the journalist-informer relation. The demarcation between what is confidential and what is for publication is not sharply drawn and often depends upon the particular context or timing of the use of the information. Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidence with quite the same sure judgment he invokes in the normal course of his professional work.

The Government characterizes this anticipated loss of communication as Black Panther reprisal: as manifesting a Black Panther demand that, "if you subpoena Caldwell, we will never speak to you again." It argues, that it is unthinkable that the American people would capitulate to such extortion.

---

[7] One reporter for the New York Times states: "[O]n every story there is a much subtler and much more important form of communication at work between a reporter and his sources. It is built up over a period of time working with and writing about an organization, a person, or a group of persons. The reporter and the source each develops a feeling for what the other will do. The reporter senses how far he can go in writing before the source will stop communicating with him. The source, on the other hand, senses how much he can talk and act freely before he has to close off his presence and his information from the reporter. It is often through such subtle communication that the best and truest stories are written and printed in The Times, or any other newspaper."

Appellant relates his own experiences as follows:

"I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months that they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive, I found that not only were the party leaders available for in-depth interviews but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership.

"As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country.

"The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and reporter, statements are rarely made to such reporters on an expressed 'on' or 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publication and those matters which are given in confidence."

He concludes:

"* * * if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman."

A fellow black reporter, on leave of absence from The New York Times, states:

"From my experience, I am certain that a black reporter called upon to testify about black activist groups will lose his credibility in the black community generally. His testifying will also make it more difficult for other reporters to cover that community. The net result, therefore, will be to diminish seriously the meaningful news available about an important segment of our population."

[8] This is not necessarily true of every news source. In political and diplomatic areas where the source is an undercover tipster the relationship may well be sufficiently protected by a privilege not to disclose the source.

But it is not an extortionate threat we face. It is human reaction as reasonable to expect as that a client will leave his lawyer when his confidence is shaken. The news source has placed no price tag or exaction on enjoyment of First Amendment freedoms save its continuing confidence in the discretion of the reporter.[9]

As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion.

We conclude that the privilege not to answer certain questions does not, by itself, adequately protect the First Amendment freedoms at stake in this area; that without implementation in the manner sought by appellant the privilege would fail in its very purpose.

On the other side of the balance is the Grand Jury's right to summon this witness before it and in secrecy compel him to answer questions or to resort to his privilege. It is not the right to secure appearance and testimony that is itself in issue; the District Court's protective order alone would suffice were that all. It is the right to compel presence at a secret interrogation with which we are concerned.

Throughout history secret interrogation has posed problems and caused unease. See, e.g., Note, "An Historical Argument for the Right to Counsel During Police Interrogation," 73 Yale L.J. 1000, 1034-45 (1964). We do not doubt that secret interrogation is in general essential to the integrity and effectiveness of the Grand Jury process. However, implicit in the extraordinary nature of secret interrogations, is the possibility of conflict with basic rights. When this is shown to occur it is appropriate to inquire into the need in the particular case for the specific incursion. Since compulsion to attend and testify entails the exercise of judicial process, it is appropriate that the inquiry be judicially entertained.

The question, then, is whether the injury to First Amendment liberties which mere attendance threatens can be justified by the demonstrated need of the Government for appellant's testimony as to those subjects not already protected by the privilege.

Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unncessary) that is not protected by the District Court's order. If this is true—and the Government apparently has not believed it necessary to dispute it—appellant's response to the subpoena would be a barren performance—one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.

If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here.

In light of these considerations we hold that where it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

We go no further than to announce this general rule. As we noted at the outset, this is a case of first impression. The courts can learn much about the problems in this area as they gain more experience in dealing with them. For the present, we lack the omniscience to spell out the details of the Government's burden[10] or the type of proceeding that would accommodate efforts to meet that

---

[9] Quite a different situation would be presented were the demand unrelated to the privileged relationship: E.g. "The police must free our leader."

[10] Appellant, in his brief to this court, has carefully spelled out what he feels would be required:

"Specifically, we contend that, before it may compel a newsman to appear in grand jury proceedings under circumstances that would seriously damage the news-gathering and reporting abilities of the press, the Government must show at least: (1) that there are burden.[11] The fashioning of specific rules and procedures appropriate to the particular case can better be left to the District Court under its retained jurisdiction. Cf., *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

Finally we wish to emphasize what must already be clear: the rule of this case is a narrow one. It is not every news source that is as sensitive as the Black Panther Party has been shown to be respecting the performance of the "establishment" press or the extent to which that performance is open to view. It is not every reporter who so uniquely enjoys the trust and confidence of his sensitive news source.

THE FOURTH AMENDMENT ISSUE

Appellant also moved to quash the Grand Jury subpoenas on the ground that they were based upon information obtained by unconstitutional surveillance of his interviews with Black Panther members. He sought a hearing to determine whether the subpoenas were so obtained. *Alderman* v. *United States*, 394 U.S. 165 (1969). The District Court denied the motion solely on the ground that appellant lacked standing to raise the Fourth Amendment contention. This is assigned as error.

In light of our disposition of the First Amendment question in this case, we need not reach this issue. The United States might never meet the First Amendment burden imposed upon it by the District Court order as here implemented. Even if the Government does meet that burden, the court may not have to reach this Fourth Amendment claim: the Government's showing of need for appellant's testimony may disclose a basis for the Government's information which would present no Fourth Amendment problem. If such a problem is presented it could then be discussed in light of the specific facts.

Accordingly, we regard decision upon this question as unnecessary to the present disposition of the case. We reserve the issue and decline to reach it here.

Reversed and remanded with instructions that the judgment of contempt and the order directing attendance before the Grand Jury be vacated. The District Court under its retained jurisdiction may entertain such further proceedings as may be initiated by the United States.

JAMESON, *District Judge* (concurring):

This case presents narrow issues in the "delicate and difficult" task of reconciling the First Amendment guarantee of freedom of the press with the fair administration of justice, including the broad investigatory power of a grand jury and the obligation of a witness to testify. While perhaps unnecessary for a determination of this appeal, it is helpful, in my opinion, to note the guidelines for resolving conflicts in this sensitive area, as summarized by Judge, now Mr. Justice, Stewart, in Garland v. Torre, 259 F. 2d 545, 548–549 (2d Cir.) cert. denied 358 U.S. 910, 79 S. Ct. 237, 3 L. Ed. 2d 231 (1958):

"But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task. (Citing cases). * * *

"* * * Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

"It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist

---

reasonable grounds to believe the journalist has information, (2) specifically relevant to an identified episode that the grand jury has some factual basis for investigating as a possible violation of designated criminal statutes within its jurisdiction, and (3) that the Government has no alternative sources of the same or equivalent information whose use would not entail an equal degree of incursion upon First Amendment freedoms. Once this minimal showing has been made, it remains for the courts to weigh the precise degree of investigative need that thus appears against the demonstrated degree of harm to First Amendment interests involved in compelling the journalist's testimony." While there is much to commend this suggestion, we are not certain that it represents the best or most satisfactory formulation of the requirement. See, for example, *People* v. *Dohrn, et al.*, Circuit Court of Cook County, Criminal Division, No. 69–3808, May 20, 1970.

[11] Appellant suggests that the Government's specification of need could be presented *in camera* to the District Court with appellant or his counsel present.

judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. (Citing cases). * * *

"Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. * * *

"If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. * * * ."

As stated in the court's opinion (note 6) Garland v. Torre was a civil action for libel.[1] The obligation to appear and testify is even stronger and the scope of inquiry is broader in grand jury investigations.[2]

The First Amendment rights of appellant were recognized fully by Judge Zirpoli in providing for the protective order discussed in the court's opinion. While not conceding the validity or propriety of the qualified privilege granted appellant, the Government did not seek review of that order on this appeal.[3]

The order entered by the district court is adequate to protect any unnecessary impingement of First Amendment rights *after* the appearance of the witness before the grand jury. Accordingly we are concerned with the narrow question of whether the Government's showing of a "compelling and overriding national interest that cannot be served by any alternative means" may be required in advance of the issuance of a subpoena.

Appellant did not have any express constitutional right to decline to appear before the grand jury. This is a duty required of all citizens. Nor has Congress enacted legislation to accord any type of privilege to a news reporter.[4] In my opinion the order of the district court could properly be affirmed, and this would accord with the customary procedure of requiring a witness to seek a protective order after appearing before the grand jury. I have concluded, however, that Judge Merrill's opinion properly holds that the same result may be achieved by requiring the Government to demonstrate the compelling need for the witness's presence prior to the issuance of a subpoena and in this manner avoid any unnecessary inpingement of First Amendment rights.

As Judge Merrill has suggested, this is a case of first impression. It would seem that the district court could develop procedures which would not unduly hamper or interfere with the investigatory powers of the grand jury. The Government would have the same burden, except that it would make its showing at a hearing in advance of the issuance of subpoenas rather than after the witness appears and seeks a protective order.

---

[1] As Judge Merrill's opinion notes, *Garland* v. *Torre* did not involve the "use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news nor with a case where the identity of the news source is of doubtful relevance or materiality."

[2] In distinguishing between investigations by a grand jury and those conducted by commissions created by Congress, Mr. Justice Douglas noted that the grand jury is the "only accusatory body in the Federal Government that is recognized by the Constitution," and that "[I]t has broad investigational powers to look into what may be offensive against federal criminal law." Dissenting opinion in *Hannah* v. *Larche,* 363 U.S. 420, 499, 80 S. Ct. 1502, 1549, 4 L. Ed. 2d 1307 (1960).

[3] At oral argument counsel for the Government submitted a press release from the Attorney General setting forth new Department of Justice guidelines for subpoenas to the news media, in which it is expressly recognized that the "Department does not approve of utilizing the press as a spring board for investigations", and which provide, inter alia, that, "[T]here should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence"; that "[T]he government should have unsuccessfully attempted to obtain the information from alternative non-press sources"; that subpoenas "should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information"; and that "subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material." John N. Mitchell, "Free Press and Fair Trial: The Subpoena Controvery," an address before House of Delegates, American Bar Association. (August 10, 1970).

[4] Several states have enacted legislation granting qualified privileges to newsmen.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLICATION OF EARL CALDWELL AND THE NEW YORK TIMES COMPANY FOR AN ORDER QUASHING SUBPOENAS

Misc. No. 10426

Attorneys for Earl Caldwell:

Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305. Telephone: 321-2300, Ext. 3553.

Charles Stephen Ralston, 1095 Market Street, Suite 418, San Francisco, California 94103. Telephone: 861-8553.

Attorneys for The New York Times Company:

Pillsbury, Madison & Sutro, John B. Bates, Armando M. Menocal, III, William S. Mailliard, Jr., 225 Bush Street, San Francisco, California 94104. Telephone: 421-6133.

ORDER OF THE COURT

This matter comes before the Court on the motion of Earl Caldwell and The New York Times Company to quash or modify a subpoena served upon Mr. Caldwell on March 16, 1970, summoning him to appear and testify before the grand jury sitting in this District. The motion as originally filed also sought the quashing of a grand jury subpoena served upon Mr. Caldwell on February 2, 1970; but at oral argument of the matter on April 3, 1970 the Government withdrew the February 2 subpoena, and the parties have agreed that the motion to quash that subpoena is now moot.

With regard to the March 16 subpoena, the Court has read and considered the memoranda, supplementary memoranda and affidavits filed by the movants and by the Government, and the briefs and annexed affidavits filed by the following amicae curiae: The American Civil Liberties Union (together with its affiliates of Northern and Southern California), The Associated Press, Columbia Broadcasting System, Inc., Newsweek, Inc., and the Reporters' Committee on Freedom of the Press.

The Court has also judicially noticed, read and considered a series of articles authored by Earl Caldwell and published in The New York Times. Copies of these articles were furnished to the Court and the Government by the movants, and will be filed by the Court together with its order, for the convenience of the Court of Appeals in the event of an appeal. Finally, the Court has read and considered the memorandum and exhibits filed by the Government in Miscellaneous No. 10410, in support of its Application for Immunity for Sherrie Bursey and Brenda Joyce Presley. At oral argument in the present matter, counsel for movants was granted leave to make this memorandum and its exhibits part of the record herein, and a copy of it will also be filed herewith.

On April 3, 1970, the Court heard and considered oral argument on behalf of the parties and of Columbia Broadcasting System, Inc. as amicus curiae. At the conclusion of the argument, the Court announced its opinion, which was filed on April 6, 1970. For the reasons stated in that opinion, the Court is satisfied that The New York Times Company has standing to join with Earl Caldwell in the motion to quash the subpoena of March 16.

Upon the record herein, it appears:

(1) That the testimony of Earl Caldwell sought to be compelled by the subpoena of March 16 will relate to activities of members of the Black Panther Party;

(2) That Mr. Caldwell's knowledge of those activities derived in substantial part from statements and information given to him, as a professional journalist, by members of the Black Panther Party, within the scope of a relationship of trust and confidence;

(3) That confidential relationships of this sort are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news;

(4) That compelled disclosure of information received by a journalist within the scope of such confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news;

(5) Specifically, that in the absence of a protective order by this Court delimiting the scope of interrogation of Earl Caldwell by the grand jury, his appearance and examination before the jury will severely impair and damage his confidential relationships with members of the Black Panther

Party and other militants, and thereby severely impair and damage his ability to gather, analyze and publish news concerning them; and that it will also damage and impair the abilities of other reporters for The New York Times Company and others to gather, analyze and publish news concerning them; and

(6) That the Government has shown no compelling and overriding national interest in requiring Mr. Caldwell to give testimony before the grand jury that would invade and jeopardize his confidential relationships with members of the Black Panther Party.

Accordingly, pursuant to the Court's opinion of April 6, 1970, it is hereby *ORDERED:*

(1) That if and when Earl Caldwell is directed to appear before the grand jury pursuant to the subpoena of March 16, 1970, he shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.

(2) That specifically without limiting paragraph (1), Mr. Caldwell shall not be required to answer questions concerning statements made to him or information given to him by members of the Black Panther Party unless such statements or information were given to him for publication or public disclosure;

(3) That, to assure the effectuation of this order, Mr. Caldwell shall be permitted to consult with his counsel at any time he wishes during the course of his appearance before the grand jury;

(4) That, except to the extent set forth in paragraphs (1) through (3), the motion to quash or modify the subpoena of March 16, 1970, is denied;

(5) That the Court will entertain a motion for modification of this order at any time upon a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means; and that the Court retains jurisdiction of this matter, for the purposes of entertaining such a motion or other motions by any party for the implementation or modification of this order; and

(6) That this order and the return date of the subpoena of March 16, 1970, are stayed until April 26, 1970; and in the event that any party hereby files a notice of appeal of this order on or before April 26, 1970, then this order and the return date of the subpoena are further stayed until final disposition of the appeal, or until further order of this Court.

Dated: April 7, 1970.

ALFONSO J. ZIRPOLI,
Judge of the United States District Court.

Submitted by Attorneys for Movants, April 7, 1970
By John B. Bates

Service of a copy of the above is hereby acknowledged this 7th day of April, 1970.

By James L. Browning (U.S. Attorney),
United States Department of Justice.

120 N.J.Super. 460

In the Matter of Peter BRIDGE, Charged with Contempt of Court.

Superior Court of New Jersey,
Appellate Division.

Argued Aug. 21, 1972.

Decided Sept. 12, 1972.

Proceedings on appeal from order of the Superior Court, Law Division, holding newspaperman in contempt for refusing to answer questions before grand jury and confining him to jail until he purged himself by answering questions. The Superior Court, Appellate Division, Collester, P. J. A. D., held that where in a published article newspaper writer disclosed that Housing Authority Commissioner was source of his information as to alleged bribe attempt and disclosed at least part of information given him by Commissioner, writer had waived his newspaperman's privilege and could be compelled to testify before grand jury investigating bribery; testimony could be elicited from writer both as to published and unpublished information secured from Commissioner. In addition, the Court held that newspaperman had no First Amendment privilege to refuse to answer questions.

Order affirmed.

1. Appeal and Error 🔑1195(1)

Holding, on appeal from denial of motion to quash subpoena to appear before grand jury, that newsman had waived his statutory privilege by disclosing in published news article the source of his information and that compelling his appearance did not amount to an abridgment of his rights under the First Amendment became the law of the case and was controlling on such issues in proceedings on remand. U.S.C.A.Const. Amend. 1; Rules of Evidence, rules 27, 37, N.J.S.A. 2A:84A-21, 29.

2. Witnesses 🔑219(1)

Where in a published article newspaper writer disclosed that Housing Authority Commissioner was source of his information as to alleged bribe attempt and disclosed at least part of information given him by Commissioner, writer had waived his newspaperman's privilege and could be compelled to testify before grand jury investigating bribery; testimony could be elicited from writer both as to published and unpublished information secured from Commissioner. Rules of Evidence, rules 27, 37, N.J.S.A. 2A:84A-21, 29.

3. Statutes 🔑47

Statute providing that a person waives his right or privilege to refuse to disclose a specified matter if, without coercion and with knowledge of his right or privilege, he makes disclosure of any part of the privileged matter is not unconstitutionally vague. Rules of Evidence, rule 37, N.J.S.A. 2A:84A-29.

4. Constitutional Law 🔑90.1(3)

Witnesses 🔑196

The First Amendment accords a newspaperman no privilege against appearing before a grand jury and answering questions as to either the identity of his news source, be it a public official or private individual, or information which he has received in confidence; no balancing of society's interest in being informed and the State's interest in obtaining information relevant to the investigation of a particular crime is required to determine when a reporter should be compelled to testify. U.S.C.A.Const. Amend. 1.

5. Constitutional Law 🔑90.1(3)

Grand Jury 🔑36

Newspaper writer had no First Amendment privilege to refuse to answer questions which were posed to him before grand jury investigating charge of bribery and which related to description of briber, beneficiaries of bribe or circumstances surrounding attempt to bribe public official supplying newspaperman with information used in published article; moreover, questions eliciting such information were relevant to inquiry whether an offer to bribe a public official had been made. N.J.S.A. 2A:93-6; U.S.C.A.Const. Amend. 1.

6. Constitutional Law 🔑70.1(7)

Granting of privilege of nondisclosure to a newspaperman is a matter for the legislature and not for the courts. Const. 1947, Art. I, par. 6.

7. Contempt 🔑36

Proceeding to compel newspaperman to answer questions propounded before grand jury or be committed until he did so constituted a civil, rather than a criminal, contempt and, thus, such proceeding could be conducted by a judge other than judge who issued the order to show cause why newspaperman should not be adjudged in contempt. R. 1:10-5.

Edward J. Gilhooly, Newark, for appellant (Yauch, Peterpaul & Clark Newark, attorneys).

Richard L. Slavitt, Assistant Prosecutor, for respondent (Joseph P. Lordi, Essex County Prosecutor, attorney).

Arthur Uscher, Rutherford, for American Civil Liberties Union of New Jersey as amicus curiae, by leave of court (Friedman, Kates & Uscher, Rutherford, attorneys).

Before Judges COLLESTER, CARTON and ALLCORN.

The opinion of the court was delivered by

COLLESTER, P. J. A. D.

This is an appeal by Peter Bridge from an order of the Superior Court, Law Division, holding him in contempt for refusing to answer five questions before the Essex County grand jury and confining him to the county jail until he purged himself by answering the questions posed. The trial judge stayed the order pending an appeal and we granted the prosecutor's motion to accelerate the appeal for early argument.

On May 2, 1972 the *Newark Evening News* published an article under Peter Bridge's by-line concerning an alleged offer of a bribe to Pearl Beatty, a member of the Newark Housing Authority. The article contained the following statements:

> Mrs. Pearl Beatty, a commissioner of the Newark Housing Authority, said yesterday an unknown man offered to pay her $10,000 to influence her vote for the appointment of an executive director of the authority.
>
> Mrs. Beatty said also that at least two other commissioners had been harassed and threatened in efforts to control their votes.
>
> * * * * * * *
>
> Mrs. Beatty said, "a man walked into my office and offered me $10,000 if I would vote for 'their' choice for executive director."

The Essex County Grand Jury commenced an investigation of the alleged bribe attempt and on May 19, 1972 subpoenaed Bridge to appear before it. Bridge moved to quash the subpoena. Assignment Judge Giuliano denied the motion and ordered Bridge to appear before the grand jury. He rejected Bridge's contention that compelling him to testify would violate the guarantee of freedom of the press contained in the First Amendment. Judge Giuliano held that Bridge had waived the privilege afforded him by N.J.S.A. 2A:84A-21 (Evidence Rule 27) under the provisions of N.J.S.A. 2A:84A-29 (Evidence Rule 37).

Bridge moved for leave to appeal from the order. This court granted leave and, following oral argument, affirmed the order denying the motion to quash and directing Bridge to appear before the grand jury. No appeal or petition for certification of the appeal was thereafter filed with the Supreme Court.

On June 8, 1972, following this court's decision, Bridge appeared before the grand jury. When he refused to answer certain questions he was brought before Judge Giuliano who, following a hearing, directed Bridge to answer. On June 14 Bridge again returned before the grand jury and refused to answer certain questions. Judge Giuliano ordered him to answer the questions, including the five questions which were the basis for the subsequent contempt action.[1] When Bridge subsequently refused to answer the five questions before the grand jury, Judge Giuliano ordered Bridge to show cause why he should not be adjudged in contempt. The order was made returnable before Judge Meanor. Following a hearing, Judge Meanor held that Bridge had neither a constitutional privilege nor a statutory privilege to refuse to answer the questions. The judge entered an order adjudging Bridge to be in contempt of court and directed that he be confined to the county jail until he answered the five questions or until the grand jury was discharged. This appeal followed.

[1] We first note that the two principal issues in this appeal, namely, (1) whether appellant waived his newspaperman's privilege accorded by Evidence Rule 27 (N.J.S.A. 2A:84A-21), and (2) whether the First Amendment grants him the privilege of refusing to testify before a grand jury, were raised on his prior appeal from the denial of the motion to quash the subpoena. In that appeal we held that appellant waived his privilege under Evidence Rule 27 by disclosing in the news article the source of his information and that compelling his appearance before the grand jury did not amount to an abridgment of his rights under the First Amendment. The issues having been decided on the merits in that appeal, the decision became the law of the case. State v. Cusick, 116 N.J.Super. 482, 485, 282 A.2d 781 (App. Div.1971). However, rather than dismiss the appeal on that ground, not raised by either party, we prefer to decide the case on its merits.

The privilege of nondisclosure granted to a newspaperman in this State is set forth in Evidence Rule 27 (N.J.S.A. 2A:84A-21). It reads as follows:

> Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered.

Evidence Rule 37 (N.J.S.A. 2A:84A-29) provides that "a person waives his right or privilege to refuse to disclose * * * a specified matter if he * * * without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter * * *."

[2] Appellant first argues that the term "source" in Evidence Rule 27 protects both the identity of the informant as well as that part of the informant's statement which was not published and that his disclosure of the identity of the informant does not constitute a waiver of his right of nondisclosure of the unpublished informa-

---

[1] The questions propounded to the witness were:
1. Mr. Bridge, would you please tell us whether Mrs. Beatty provided a description of the unknown man?
2. Did Mrs. Beatty provide you with specific acts of harassment and threats other than those outlined in the newspaper article?
3. Within the framework of this: "A man walked into my office and offered me $10,000 if I would vote for 'their' choice for executive director," did Mrs. Beatty indicate who their choice for executive director was?
4. Mr. Bridge, in addition to that which is contained in the article, what else did Mrs. Beatty say? Did she say it was a tall man, a white man, a black man, a heavy man, a short man?
5. Mr. Bridge, did Mrs. Beatty indicate when, in fact, the bribe offer took place?

tion. We conclude that the argument lacks substance. Evidence Rule 37 clearly states that a person waives his privilege of nondisclosure if he "made disclosure of any part of the privileged matter." *Cf.* In re Murtha, 115 N.J.Super. 380, 387–388, 279 A.2d 889 (App.Div.1971), certif. den. 59 N.J. 239, 281 A.2d 278 (1971). Here appellant disclosed in the newspaper article that Mrs. Beatty was the source of his information and also disclosed at least part of the information given him by Mrs. Beatty. We are satisfied and hold that appellant waived his newspaperman's privilege and can be compelled to testify before the grand jury like any other person.

[3] We find no merit in appellant's contention that Evidence Rule 37 (N.J.S.A. 2A:84A–29) is unconstitutionally vague.

[4, 5] We turn next to the question of whether appellant was privileged under the First Amendment to refuse to answer the five questions posed to him before the grand jury. In ruling that Bridge was not so privileged Judge Meanor relied on Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). We are in full accord with Judge Meanor's ruling. In *Branzburg* the court laid down a broad rule that the First Amendment accords a newspaperman no privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence. The court specifically stated, "We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." (At 690, 92 S.Ct. at 2660, 33 L.Ed.2d at 644).

Appellant contends that if a reporter is required to testify before a grand jury concerning unpublished information received from a public official, such as Mrs. Beatty, then "government" will have an effective tool to prevent its wrongdoings from being brought to the attention of the public; that not only must the identity of a public employee be protected but all unpublished information received from the public employee as well. He bases his argument on the dissenting opinions filed in *Branzburg.* We cannot agree with appellant's argument. A reading of the majority opinion in *Branzburg* indicates that the court there considered a similar argument and refused to accept it. See 408 U.S. at 692–698, 92 S.Ct. at 2662–2664, 33 L.Ed.2d at 646–648. The court stated:

> Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future. (At 695, 92 S.Ct. at 2663, 33 L.Ed.2d at 647–648).

Appellant also contends that a majority of the justices in *Branzburg* held that society's interest in being informed, which requires a free flow of information, must be weighed against the State's interest in obtaining information relevant to the investigation of a particular crime. He alleges that the five questions which he refused to answer are so lacking in relevance and need that no matter upon whom the burden of proof is placed in balancing of the issues, it is clear that his rights as a reporter outweigh any right of the State. We do not read the majority opinion in *Branzburg* as requiring a balancing of the interests test to determine when a reporter should be compelled to testify. Quite to the contrary, Justice White in the majority opinion rejects such a contention, 408 U.S. at 698–709, 92 S.Ct. at 2665–2670, 33 L.Ed. 2d at 650–655.

Moreover, we agree with Judge Meanor that the five questions which Bridge refused to answer were relevant to the inquiry being conducted by the grand jury to determine whether an offer to bribe a housing commissioner, in violation of N.J. S.A. 2A:93-6, had been made.

[6] It is also argued that since the court in *Branzburg* stated that it was powerless to erect any bar to state courts construing their own constitutions so as to recognize a newspaperman's privilege, either qualified or absolute, we should construe N.J.Const., Art. I, par. 6 to include an absolute or qualified privilege for newspapermen for the reasons expressed in the dissenting opinions filed in *Branzburg*. No decisions of our courts are cited in support of this proposition. The only privilege from nondisclosure by a newspaperman in this State is set forth in Evidence Rule 27, enacted by the Legislature in 1960 (N.J.S.A. 2A:84A-21). We are satisfied that the granting of such privileges is a matter for the Legislature and not for the courts.

[7] Finally, appellant argues that Judge Meanor lacked jurisdiction to enter the order under review because the sole issue on the return of the order to show cause was whether appellant was guilty of criminal contempt. He contends that a proceeding to compel him to answer the questions or be committed until he did so, brought pursuant to R. 1:10-5, could only be heard and determined by Judge Giuliano who issued the order to show cause.

We find no merit in appellant's contentions. The record indicates that the State did not seek to punish appellant for criminal contempt in a proceeding under R. 1:10-2 but to compel compliance with the order to answer the questions propounded before the grand jury. Such a proceeding has been held to constitute civil contempt, Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966), and is provided for under R. 1:10-5. See also In re Contempt of Carton, 48 N.J. 9, 222 A.2d 92 (1966), where the court stated, "Confinement terminable upon defendant's compliance is usually the hallmark of a civil proceeding." (at 23, 222 A.2d at 100.).

We do not read R. 1:10-5 to provide that the judge who issued the order to show cause alone has power to hear and determine the issues raised in such a proceeding. As assignment judge, Judge Giuliano could properly assign the matter to another judge.

We have carefully considered the points raised in the brief filed by the *amicus curiae*, all of which support appellant's contentions. We find none of the points to be persuasive.

The order under review is affirmed.

---

120 N.J.Super. 469

STATE of New Jersey, Plaintiff-Respondent,

v.

Matthew J. HALE, Jr., Defendant-Appellant.

Superior Court of New Jersey,
Appellate Division.

Submitted Sept. 11, 1972.

Decided Sept. 19, 1972.

On appeal from Superior Court of New Jersey, Law Division, Burlington County.

George H. Barbour, Maple Shade, for appellant.

George F. Kugler, Jr., Atty. Gen., for respondent (Fred H. Kumpf, Deputy Atty. Gen., of counsel and on the brief).

Before Judges COLLESTER, LEONARD and HALPERN.

[Civ. No. 38961. Second Dist., Div. One. Dec. 17, 1971.]

WILLIAM T. FARR, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
THE PEOPLE, Real Party in Interest.

SUMMARY

By petition for writ of review in the Court of Appeal, an ex-newspaperman challenged the propriety of a contempt order entered against him by the trial judge in a mass murder trial. The judge had made an Order re Publicity, restricting news releases by counsel, court employees, attachés and witnesses. Under petitioner's by-line, a local newspaper report was published relating some particularly gory and prejudicial material contained in a prospective prosecution witness' statement, copies of which, in advance of her testimony in court, had been circulated by the district attorney's office to prosecuting counsel, defense counsel, and the court. The only other persons that could properly have had access to them were the attachés and the employees of the district attorney's office. Much of the material in the statement was ruled to be inadmissible at the murder trial. Petitioner stated that, on discovering the existence of this statement, he had solicited and received three copies from the forbidden sources, including two of the six attorneys of record, but at an investigative hearing following entry of judgments of conviction in the capital cases, all six counsel denied that they were the source of the leak, and the contempt was based on petitioner's refusal to identify them by name. The Court of Appeal affirmed the order. Noting that a trial court retains the power to punish for contempt occurring in an action even though the principal action itself has terminated, the court held that retention of jurisdiction was vital in the instant case to perfect the record on appeal in the capital cases, especially in view of the possibility that it was the prosecution team that had leaked the statement, proof of which, in combination with petitioner's resignation from the newspaper and acceptance of the position of press secretary to the prosecutor himself, would have raised inferences likely to require further examination. Furthermore, petitioner was not protected by Evid. Code, § 1070, providing immunity from contempt for

a reporter who refuses to disclose the source of any information procured for publication and published in a newspaper; to construe the statute as granting immunity to petitioner under such circumstances would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and discipline its own officers. Nor was petitioner protected by the First Amendment's guaranty of the freedom of the press; the public interest in insuring a fair trial by temporarily denying the news media the use of such prejudicial material outweighed the inquiry's potential inhibition upon the free flow of information. (Opinion by Thompson, J., with Wood, P. J., and Lillie, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1a, 1b) Contempt § 35—Jurisdiction—Superior Court—Post-trial Inquiry Into News Restriction Violation in Mass Murder Trial.—Automatic appeals to the Supreme Court of defendants' convictions in a mass murder trial did not deprive the trial court of jurisdiction to conduct a hearing, to require the attendance of witnesses, and to compel their testimony, to determine whether its Order re Publicity, restricting news releases by counsel, court employees, attachés, and witnesses, had been violated by a newspaper report (whose contents were stated by its author to have emanated from such sources) relating some particularly gory and prejudicial material contained in a prospective prosecution witness' statement, copies of which, in advance of her testimony in court, had been circulated by the district attorney's office to prosecuting counsel, defense counsel, and the court. Retention of such jurisdiction by the trial court was rendered particularly vital by the possibility that it was the prosecution team that had leaked the statement, proof of which, in combination with the news reporter's resignation from the newspaper and acceptance of the position of press secretary to the prosecutor himself, would have raised inferences likely to require examination during the hearings on the automatic appeals in the capital cases.

(2) Contempt § 35—Jurisdiction—Superior Courts—Inquiry After Termination of Principal Action. — A trial court retains the power to punish for contempt occurring in an action even though the principal action itself has terminated.

(3a, 3b) Contempt § 30.5—Acts Constituting Contempt—Disobedience of Court Order—Refusal to Testify—New Media Sources.—Evid. Code, § 1070, providing immunity from contempt for a reporter who refuses to disclose the source of any information procured for publication and published in a newspaper, did not protect the author of a newspaper report that (apparently in violation of an Order re Publicity issued by the trial court in a mass murder trial to restrict news releases by counsel, court employees, attachés, and witnesses) related some particularly gory and prejudicial material contained in a prospective prosecution witness' statement, copies of which, in advance of her testimony in court, had been circulated by the district attorney's office to prosecuting counsel, defense counsel, and the court, and much of which was excluded from evidence at the trial. Although the author stated that he had solicited and received three copies of such statements from the forbidden sources, including two of the six attorneys of record, he refused to identify them by name, and all six counsel denied that they were the source of the leak; to construe the statute as granting immunity to the author under such circumstances would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and discipline its own officers.

[Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant, as contempt, note, 33 **A.L.R.3d** 1116. See also **Cal.Jur.2d,** Contempt, § 18; **Am.Jur.2d,** Contempt, § 55 et seq.]

(4) Contempt § 6 — Statutory Provisions — Power of Legislature.—The power of contempt possessed by the courts is inherent in their constitutional status. While the Legislature can impose reasonable restrictions upon the exercise of that power or the procedures by which it may be exercised, it cannot declare that certain acts shall not constitute a contempt.

(5a, 5b) Constitutional Law § 116(5)—Freedom of Expression—Interference With Justice; Punishment for Contempt.—The freedom of the press guaranteed by the First Amendment did not preclude the trial court in a mass murder prosecution from conducting a post-trial inquiry into the sources of a newspaperman's by-lined report that, apparently in violation of the trial court's Order re Publicity, related some particularly gory and prejudicial material contained in a prospective prosecution witness' statement, copies of which, in advance of her testimony in court, had been circulated by the district attorney's office only to prosecuting counsel, defense counsel, and the court. The public interest in insuring a fair trial by temporarily denying the news media the use of such prejudicial material—much of which was excluded from evidence at the trial—outweighed the inquiry's potential inhibition upon the free flow of information.

(6) **Constitutional Law § 116(3)—Freedom of Expression—Limitation on Right.**—Freedom of the press, guaranteed by the First Amendment to insure the unimpeded flow of information indispensable to the existence of a democratic society, is not absolute. It is limited by narrow compelling exceptions; for example, the public interest in fair trial is so compelling as to require that in appropriate situations the public temporarily be denied access to prejudicial publicity emanating from court controllable sources.

COUNSEL

Cooper & Nelson and Grant B. Cooper for Petitioner.

Robert C. Lobdell, Gibson, Dunn & Crutcher, Robert S. Warren, Dean Lesher, George R. Johnson, Flint & Mac Kay, Edward L. Compton, Edwin Freston, Jack B. Purcell, William Whitsett, McCutchen, Black, Verleger & Shea, Howard J. Privett, Bodle, Fogel, Julber & Reinhardt, George E. Bodle, Daniel Fogel, Stephen Reinhardt, and Earl Klein as Amici Curiae on behalf of Petitioner.

John D. Maharg, County Counsel, and William F. Stewart, Deputy County Counsel, for Respondent.

No appearance for Real Party in Interest.

OPINION

THOMPSON, J. — This is a petition for writ of review of an order of respondent court adjudging petitioner Farr to be in contempt for failing to answer questions put to him. We conclude that the trial court properly found petitioner to be in contempt of court.

The matter at bench is an outgrowth of the trial of Charles Manson and his codefendants for two sets of multiple murders. The crimes themselves and the ensuing trial were the subjects of much sensational notoriety. Early in the proceedings the superior court entered an Order re Publicity. That order prohibited any attorney, court employee, attaché, or witness from releasing for public dissemination the content or nature of any testimony that might be given at trial or any evidence the admissibility of which might have to be determined by the court. The order became effective December 10, 1969, and remained in effect throughout the trial.

On October 5, 1970, during the course of the trial, Stephen R. Kay, one of the deputy district attorneys assigned to the prosecution of the Manson case, obtained a written statement from Mrs. Virginia Graham, a potential witness. The statement recites that Susan Atkins, a codefendant in the murder prosecution, had confessed the crimes to Mrs. Graham in lurid detail and implicated Manson. It states that the defendants planned after the murders to cross the country by bus and in the course of their travels to murder people at random. Miss Atkins purportedly told Mrs. Graham that she and her codefendants had planned to murder a series of show business personalities each in a particularly vicious and bizarre manner. Included in the list of intended victims were Elizabeth Taylor whose eyes were to be removed and mailed to an ex-husband, Richard Burton who was to be castrated, Frank Sinatra who was to be skinned alive while hanging from a meat hook, and Tom Jones whose throat was to be cut while he was engaged in an act of sexual intercourse with Miss Atkins at knife point if necessary. Steve McQueen was also mentioned as a potential victim.

Copies of the Virginia Graham statement were prepared by the prosecution and at the court's instruction were delivered one to each attorney then appearing for the defense and one to the trial court. No other copies of the statement were released. The statement was edited to exclude inadmissible matter in preparation for Mrs. Graham's testimony. In October 1970, petitioner Farr was a reporter for the Los Angeles Herald Examiner, a daily newspaper. He learned of the Graham statement. Although aware of the content of the December 10, 1969, Order re Publicity he contacted three persons subject to the court order seeking a copy of the statement. Farr told his potential sources of the statement that he would keep confidential the identity of the source. He received two copies of the statement on October 7, each from an attorney of record in the murder trial and one copy on the morning of October 8 from a person subject to the Order re Publicity who may or may not have been an attorney of record.

On October 8, 1970, Robert Steinberg, an attorney representing Mrs. Graham, told the trial court that it had come to his attention "that one of the defense lawyers" had released the Graham statement to Farr. At an in-chambers hearing, Judge Older, presiding over the Manson trial, asked Farr if the Herald Examiner intended to print a story based upon the statement. He also sought the identity of the persons who had given a copy to Farr. While informing the court that he had copies of the Graham statement, Farr refused to disclose the sources of it, asserting the immunity from contempt granted to newspapermen by Evidence Code section 1070. On October 9, Farr's story bearing his by-line and headlined "Liz, Sinatra on Slay List—Tate Witness" appeared in the Herald Examiner. The story repeated the sensational, gory details of planned murders contained in the Graham statement as well as material in the statements implicating Manson in the murders already committed. Mrs. Graham testified in the Manson trial on October 10. Much of the matter contained in the statement given by her to Kay and printed in the Herald Examiner story was not permitted in evidence.

Manson, Miss Atkins, and their codefendants were found guilty of the counts of murder charged against them and were sentenced to death. An automatic appeal to the Supreme Court is now pending. After judgment in the Manson case the trial court, on May 19, 1971, convened a hearing to determine the source of the Herald Examiner story recounting the Graham statement. At the outset, the trial court announced that the purpose of its hearing was to determine whether there had been a violation of its Order re Publicity which had jeopardized a fair trial for the defendants in the Manson case.

By May 19, Farr had terminated his position with the Herald Examiner and accepted employment as press secretary to the Los Angeles District Attorney, the prosecutor in the Manson trial. Farr was called as the first witness at the hearing. He stated that with knowledge of the order prohibiting the disclosure he had obtained copies of the Graham statement from two of the attorneys of record in the Manson trial and identified the members of the group to which those two belonged as Mr. Bugliosi, Mr. Musich, and Mr. Kay, all deputy district attorneys, and Mr. Kanarek, Mr. Shinn, and Mr. Fitzgerald, counsel for various of the defendants.[1] Having received that information, the trial court recessed the hearing to permit interrogation of the attorneys designated by Farr.

Messrs. Bugliosi, Musich, Kay, Kanarek, Shinn, and Fitzgerald were subpenaed. Each testified under oath in effect denying that he had directly or indirectly furnished the Graham statement to Farr. Members of the prosecutorial team strongly intimated that the statements must have come from one or more of defense counsel. The attorneys for the defense intimated with equal strength that the source was the prosecution. The trial court again recessed the hearing to permit further questioning of Farr.

---

[1] Ronald Hughes, counsel for one of the defendants in the Manson trial died during the trial. Farr acknowledged that Mr. Hughes was not a source of the Graham statement.

The hearing resumed, and a series of questions was asked of Farr. He acknowledeged that he had obtained three copies of the Graham statement, two from attorneys of record, members of the previously identified group of six, and one from a person subject to the court order but whom Farr refused to disclose as either included or excluded from the group of six. He refused to answer a series of questions asking the identity of the persons who had furnished the Graham statement to him including specific interrogation naming each lawyer in the group of six previously disclosed. Farr similarly refused to answer questions seeking to ascertain the places where he had obtained the copies of the statements, the attorneys of record approached by him to obtain the statement and to whom he had given a promise of confidentiality of source, a question asking whether a source of the statement was an associate of an attorney of record, and a question asking whether a copy of the statement had been obtained from the office of the district attorney. Farr justified his refusal to answer by reference to Evidence Code section 1070. In each instance of a refusal to answer the court ordered an answer on penalty of contempt. After a further refusal the court held Farr to be in direct contempt. It ordered him incarcerated in the county jail until he answered the questions but stayed its order to permit Farr to pursue this writ of review.

In this proceeding, petitioner Farr contends: (1) the judgments of guilt entered in the Manson trial and automatic appeal of those judgments to the Supreme Court deprived the trial court of jurisdiction over the trial so as to render it powerless after judgment to conduct a hearing into the circumstances of the purported breach of the Order re Publicity; (2) petitioner Farr is granted immunity from punishment for contempt by Evidence Code section 1070 because he was a "newspaperman" when he solicited and received the Graham statements although he was no longer a "newspaperman" at the time of the hearing; and (3) the sources of the Graham statements are protected from disclosure by a First Amendment privilege. Amici curiae who have filed briefs in support of petitioner's position contend, in addition, that the Order re Publicity is void because it constitutes an unconstitutional restriction upon freedom of the press. We conclude that the judgment of contempt is valid.

Jurisdiction of Trial Court

(1a) Petitioner contends that the trial court was without jurisdiction to proceed with its inquiry into possible violations of its Order re Publicity. He argues that the trial of the Manson matter had ended before the inquiry commenced and concludes that by reason of the end of the principal action the court, if it desired to institute punishment for contempt of an order made in the course of the trial, was limited to referring the matter to the city attorney for appropriate action.

A contention identical with that made by petitioner here has been made to the Court of Appeal in an earlier case and rejected by it. There a dissatisfied litigant had accused the court reporter of tampering with the record and one of the counsel in the case with unethical solicitation of litigation. The trial out of which the complaint arose had been terminated by a voluntary dismissal. The trial court nevertheless conducted a hearing to determine the validity of the charges. Two witnesses called at the hearing refused to testify and were held in contempt. On review of the contempt adjudication the witnesses contended that jurisdiction of the trial court over the principal action having terminated, it no longer could proceed with the hearing on the allegations of misconduct by the reporter and counsel. They argued that the sole remedy lay in a criminal contempt prosecution instituted by the district attorney. The Court of Appeal rejected the contention holding that the trial court had power to proceed and that the witnesses were in contempt of the court for refusing to answer questions put to them in the course of the hearing. It said: "It may be conceded that if an unverified complaint were presented against a person who had no connection with the court or with any adjourned or pending proceeding before it the judge might be warranted in declining to file and consider it. Ordinarily, complaints charging crime are filed in a justice or municipal court. . . . However, the same does not hold true as to a court reporter, who is an adjunct of the court. . . . Neither does it apply to counsel who have conducted a trial or other hearing before the superior court. And the court's power does not end with the right to control 'its ministerial officers and all other persons in any manner connected with a judicial proceeding,' but also in furtherance of justice it may 'compel the attendance of persons to testify in an action or proceeding pending therein.' " (*Whitlow* v. *Superior Court*, 87 Cal.App.2d 175, 182 [196 P.2d 590]; hear. den.) **(2)** Our Supreme Court has recently cited *Whitlow* with approval in a decision upholding the proposition that a trial court retains the power to punish for contempt occurring in an action although the principal action itself has terminated. (*Morelli* v. *Superior Court*, 1 Cal.3d 328, 332 [82 Cal.Rptr. 375, 461 P.2d 655].)

(1b) In the case at bench the trial court was faced with information that two of the six trial counsel who had conducted a case before it were guilty of serious misconduct. It was both empowered and duty bound to inquire into the validity of the information. Significantly, in the early stages of its inquiry it became apparent that the prosecution in the principal case was asserting the position that the Graham statements had been given to Farr by defense counsel while the attorneys for the defense implied equally that the statements had emanated from the prosecution. Judge Older could not, if he recognized his duty as a judicial officer, blind himself to the likely possibility that the question of prejudicial publicity would be an issue on appeal of the principal case. Rather, he was required to do as he did—risk the disapproval of the powerful press and mass electronic communication media to ascertain at an early date facts which could assist the resolution of that issue on appeal and determine the complicity of the officers of his court in violations of an order which would have prevented the issue from arising. If the members of the prosecution team leaked the Graham statements to Farr the issue of the prejudicial nature of those statements may merit serious consideration on appeal. (*Sheppard* v. *Maxwell,* 384 U.S. 333, 360-361 [16 L.Ed.2d 600, 618-619, 86 S.Ct. 1507]; *People* v. *Brommel,* 56 Cal.2d 629 [15 Cal.Rptr. 909, 364 P.2d 845].) If the leak emanated from counsel for the defense the situation is materially different. The necessity for inquiry into Farr's sources of the statement is particularly acute in the matter at bench. There is the inescapable need to dispel or confirm the inferences flowing from the tender by the prosecution of an important position to Farr shortly after the leak and publication of the sensational and inflammatory story containing the Graham statement.

We thus conclude that the inquiry conducted by the trial court was necessary to its duty to control its own officers, counsel appearing before it. We conclude, also, that in the peculiar facts of the matter at bench the inquiry was necessary to discharge the duty of the trial court to perfect a record pertaining to an issue likely to arise on appeal and an equally important duty to protect the integrity of the very process of prosecution and defense of the principal case, the Manson trial. The necessity of the inquiry impels the ultimate conclusion that the trial court was empowered to require the attendance of witnesses and compel their testimony pertinent to the objects of the hearing.

Evidence Code Section 1070

(3a) Petitioner contends that the adjudication of contempt must be annulled because of the immunity from contempt provided in Evidence Code section 1070. That section states: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper. Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television."

Section 1070 read strictly does not include petitioner within the scope of its immunity. At the time of the hearing at which he refused to answer questions he was not a person described in the section. Petitioner argues that section 1070 must be construed broadly to include within its immunity a person who occupied a described status at the time he acquired the information whose source is sought although he no longer occupies the status when disclosure is required. He contends that otherwise the underlying purpose of the statute, the encouragement of free flow of information to the public, will be impaired by the reluctance of persons to communicate with reporters because of the possibility of the revelation of their identity if the reporter's status changes. Respondent counters with the argument that Evidence Code section 1070 is considerably less than an all embracing effort to aid the flow of information by protecting sources. Thus, respondent notes that the section, while immunizing persons connected with newspapers, radio, and television from contempt for failure to reveal a source does not protect persons connected with magazines, free lance authors, lecturers, or pamphleteers. (*Application of Cepeda,* 233 F.Supp. 465, 473; cf. Comment, 6 Harv. Civil Rights-Civil Liberties L.Rev. 119, 130.)

On the narrow facts of the case at bench we do not reach the issue of construction of Evidence Code section 1070 as protecting former members of the newspaper, radio, and television profession from liability to the sanction of contempt. To construe the statute as granting immunity to petitioner, Farr, in the face of the facts here present would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers.

(4) The power of contempt possessed by the courts is inherent in their constitutional status. While the Legislature can impose reasonable restrictions upon the exercise of that power or the procedures by which it may be exercised (*In re McKinney,* 70 Cal.2d 8 [73 Cal.Rptr. 580, 447 P.2d 972)], it "[cannot] declare that certain acts shall not constitute a . . . contempt." (*In re San Francisco Chronicle,* 1 Cal.2d 630, 635 [36 P.2d 369].) Thus, former subdivision 13 of Code of Civil Procedure section 1209 which provided: "[N]o speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings" was held unconstitutional by our Supreme Court as an invalid legislative effort to abridge the inherent power of the court. (*In re San Francisco Chronicle, supra.*)

(3b) If Evidence Code section 1070 were to be applied to the matter at bench to immunize petitioner from liability, that application would violate the principle of separation of powers established by our Supreme Court. That application would severely impair the trial court's discharge of a constitutionally compelled duty to control its own officers. The trial court was enjoined by controlling precedent of the United States Supreme Court to take reasonable action to protect the defendants in the Manson case from the effects of prejudicial publicity. (*Sheppard* v. *Maxwell,* 384 U.S. 333 [16 L.Ed.2d 600, 86 S.Ct. 1507].) It performed its duty by issuing the Order re Publicity. By petitioner's own statement that order was violated by two attorneys of record, of a list of six counsel in the case. Those attorneys were officers of respondent court. By petitioner's own statement the violations occurred because of his solicitation. Respondent court was both bound and empowered to explore the violations of its order by its own officers. (*Wood* v. *Georgia,* 370 U.S. 375, 383 [8 L.Ed.2d 569, 576, 82 S.Ct. 1364];[2] see also, Wright, "Fair Trial and Free Press," 57 Judicature 377, 381; and Mosk, "Free Press and Fair Trial—Placing Responsibility," 5 Santa Clara Lawyer 107, 119;[3] Cooper, "The Rationale for the ABA Recommendations," 42 Notre Dame Lawyer 857.)

Without the ability to compel petitioner to reveal which of the six attorney officers of the court leaked the Graham statement to him, the court is without power to discipline the two attorneys who did so, both for their violations of the court order and for their misstatement to the court that they were not the source of the leak. Equally significant is the proposition that petitioner tarred six counsel with the same brush. Unless the court compels him to reveal which two of the six violated their professional obligation, four reputations of officers of the court will remain unjustly impaired.

We thus conclude that Evidence Code section 1070 cannot be applied to shield petitioner from contempt for failure to reveal the names of the two attorneys of record in the Manson trial who furnished him with copies of the Graham statement. A closer question exists with respect to petitioner's refusal to divulge the identity of the third person, possibly not an attorney of record but subject to the Order re Publicity who gave him a copy of the statement. Here the court's power to compel an answer in the face of Evidence Code section 1070 must rest primarily upon the necessity of disclosure as a means of enforcement of its obligation to prevent prejudicial publicity emanating from its attachés or the office of the prosecuting attorney. We conclude here, also, that section 1070 if applied to immunize petitioner from contempt would unconstitutionally interfere with the power and duty of the court. The record is clear that the only persons other than attorneys of record who had access to the Graham statement and who were subject to the Order re Publicity were attachés of the court and members of the district attorney's office. The mandate of the United States Supreme Court that the trial court control prejudicial publicity emanating from such sources (*Sheppard* v. *Maxwell, supra,* 383 U.S. 333) can be discharged only if that court can compel disclosure of the origins of such publicity.[4]

---

[2] "[C]ourts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions" including "the authority and power . . . to assure litigants a fair trial, . . ."

[3] "[C]ourts must be prepared to deal firmly with lawyers who choose to conduct their litigation in the forum of newspaper columns or television, instead of in the courtroom."

Freedom of the Press

(5a) Petitioner argues that the freedom of the press guaranteed by the First Amendment to the United States Constitution preclude inquiry into a reporter's sources of news. While existing decisional law does not support that position (see note, "Reporters and Their Sources: The Constitutional Right to a Confidential Relationship," 80 Yale Law Journal 317, 318, fn. 5, 6; comment, 6 Harv. Civil Rights-Civil Liberties L.Rev. 119, 120, fn. 9, 10), the recent grant of certiorari by the United States Supreme Court in three cases indicates a substantial possibility of change in the concept of the scope of protection afforded by the First Amendment to news sources. (*Caldwell* v. *United States,* 434 F.2d 1081, cert. granted, sub. nom. *United States* v. *Caldwell,* 402 U.S. 942 [29 L.Ed.2d 109, 91 S.Ct.——]; *In re Pappas* (1971) —— Mass. —— [266 N.E.2d 297], cert. granted sub. nom. 402 U.S. 942 [29 L.Ed.2d 110, 91 S.Ct. 1619]; *Branzburg* v. *Pound* (Ky. 1970) 461 S.W.2d 345, cert. granted sub. nom. *Branzburg* v. *Hayes,* 402 U.S. 942 [29 L.Ed.2d 109, 91 S.Ct. 1616].)

---

[4] We express no opinion on the quantum of proof required to establish that inquiry into a newsman's source is necessary to permit the court to carry out its duty to control its own officers and to restrict persons subject to its control from disseminating prejudicial pretrial publicity. Here petitioner has admitted the necessary facts. Neither do we express an opinion on the validity of Evidence Code section 1070 where a possible source of the newsman's story contrary to a *Sheppard* order is other than an attorney of record, a court attache, or the prosecutor's office.

The context of the case at bench precludes the necessity of awaiting the outcome of the three cases now before the United States Supreme Court. All involve inquiries into reporter's sources of information relevant to prosecution of criminal activity but none involves questions seeking the source of the violation of a trial court order designed to prevent prejudicial publicity as does the matter here. Existing United States Supreme Court precedent indicates that regardless of the outcome of the three cases now before that tribunal, no rule of confidentiality of source will protect the petitioner in the case at bench.

(6) Freedom of the press as guaranteed by the First Amendment is not absolute but is limited by narrow compelling exceptions. (See *Zemel* v. *Rusk,* 381 U.S. 1, 16-17 [14 L.Ed.2d 179, 189-191, 85 S.Ct. 1271]; *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 [23 L.Ed.2d 430, 433, 89 S.Ct. 1827]; *Bates* v. *Little Rock,* 361 U.S. 516, 524 [4 L.Ed.2d 480, 486, 80 S.Ct. 412].) That freedom exists to insure the unimpeded flow of information indispensable to the existence of a democratic society. (*Mills* v. *Alabama,* 384 U.S. 214, 218-219 [16 L.Ed.2d 484, 487-488, 86 S.Ct. 1434]; note, "Reporters and Their Sources: The Constitutional Right to a Confidential Relationship," 80 Yale Law Journal 317, 324-325.) Where, as here, the impediment to the free flow of information is indirect by the creation of a situation in which press informants may be inhibited by the possibility that their identity will be revealed, the need for disclosure of source must be weighed to determine whether it is so compelling as to outbalance the vital interest in uninhibited flow of news. (Note, "Reporters and Their Sources: The Constitutional Right to a Confidential Relationship," 80 Yale Law Journal 317, 319-320; note and comment, "Privileged Communications—News Media," 46 Oregon L.Rev. 99, 101; comment, "Silence Orders—Preserving Political Expression by Defendants and Their Lawyers," 6 Harv. Civil Rights—Civil Liberties L.Rev. 595, 597-598; comment "Constitutional Protection For the Newsman's Work Product," 6 Harv. Civil Rights—Civil Liberties L. Rev. 119, 135.)

In the matter at bench there is an undeniable need for disclosure of source if the court is not to be thwarted in its effort to enforce its order against prejudicial publicity issued to comply with the mandate of the United States Supreme Court in *Sheppard* v. *Maxwell, supra,* 384 U.S. 333. That same mandate declares that the public interest in fair trial is so compelling as to both validate and require that in appropriate situations the public temporarily be denied access to prejudicial publicity emanating from court controllable sources. **(5b)** Since the highest court in the United States has ruled that prejudicial material from those sources may properly be kept from news media no public purpose is frustrated by compelling a newsman to reveal his source of a violation of an order such as that considered here. If disclosure of the source of a violation may inhibit future violations, the inhibition serves the public purpose declared by the High Court and deprives the public of only that information which that court has declared must be kept from it temporarily if the constitutional right to a fair trial is to be preserved.

Balancing, as we are required to do, the interest to be served by disclosure of source against its potential inhibition upon the free flow of information, we conclude that petitioner is not privileged by the First Amendment to refuse to answer the questions put to him in the trial court.

Validity of Order re Publicity

Amici curiae contend that the Order re Publicity issued by the trial court is a void interference with freedom of the press. They argue that the jury was sequestered in the Manson trial and no purpose could be served by an order limiting publicity after the jury was sequestered. The issue was not raised by petitioner in the trial court and is not raised by him in his petition for review. We thus do not have before us a record adequate to deal with the contention raised by amici. We cannot determine from the information available to us who effect the release of prejudicial publicity during the course of the Manson trial might have had. We thus must reject the contention.

Disposition

The order imposing judgment of contempt is affirmed.

Wood, P. J., and Lillie, J., concurred.

[4] The other witness, FBI Agent Michael Downey, testified that only a month or so before the Unisonic stereos were missed from Pier 21 he had found at the Fried place of business a carton of men's jackets also stolen from a Brooklyn pier. This testimony could not properly have been elicited in the Government's direct case to show a probability that the defendants committed the charged crime because they were of bad character, United States v. Bozza, 365 F.2d 206, 213 (2d Cir.1966), and even though it might have gone to the issue of guilty knowledge or intent, *see* United States v. Deaton, 381 F.2d 114, 117–118 (2d Cir.1967), and authorities cited therein, it was not so limited after proper and timely objection. The testimony was, however, produced only on rebuttal, after Ishak Fried had testified, on cross-examination to be sure, that he could not recall any previous seizure of new merchandise but that he had had on the premises shoes, old clothing and dresses for distribution to the poor through his yeshiva. Thus it did go toward his credibility. That the admission of this testimony, even if erroneous as being hearsay, was not prejudicial may be inferred from the fact that Ishak Fried was not convicted in this 9-day trial. The evidence against Zali Fried was more than enough to justify a conclusion that admission of Downey's testimony was harmless.

[5] Finally, the argument that the carton found in the hallway of Levy's loft was not admissible is grasping at straws. While the hallway may have been used by other tenants, the Waterfront Commission agent who found the carton discovered it just outside the Levy door, which in turn was "isolated by itself. . . ." With a veritable treasure trove of pirated eight-track units inside the loft, absent their cartons, and proof of the sale of cartons and stereos by the Frieds to Levy, the inference that a carton located outside an isolated door in the hallway might have come from Levy's by way of the Frieds is not, we think, altogether unwarranted or unjustified.

Judgment affirmed.

Alfonso J. CERVANTES, Appellant,

v.

TIME, INC., and Denny Walsh, Appellees.

No. 71–1555.

United States Court of Appeals,
Eighth Circuit.

Submitted April 11, 1972.

Decided July 20, 1972.

Rehearing Denied Aug. 17, 1972.

The United States District Court for the Eastern District of Missouri, James H. Meredith, Chief Judge, 330 F. Supp. 936, granted magazine's and reporter's motion for summary judgment in libel action and appeal was taken. The Court of Appeals, Stephenson, Circuit Judge, held that where mayor who brought libel action against magazine presented little more than series of self-serving affidavits to rebut magazine's showing that hundreds of documents were utilized in preparation of article and that all employees connected with article's preparation believed in truth of article with strong inference that there was good reason for belief, grant of judgment for publisher and reporter without permitting mayor to examine anonymous news sources was proper.

Affirmed.

1. Evidence 🔑101

Missouri adheres to generally accepted principle that admissibility of evidence is governed by law of state where testimony is to be heard.

2. Federal Civil Procedure ⇐1414

Where deposition was being taken in New York for use in action based on diversity of citizenship pending in District Court sitting in Missouri and witness, a citizen of New York, claimed testimonial privilege not recognized in Missouri, witness, who was magazine reporter, was not entitled to refuse to disclose news sources based on New York privilege. Civil Rights Law N.Y. §§ 79–h, 79–h(b); Fed.Rules Civ.Proc. rules 26(b) (1), 43(a), 28 U.S.C.A.

3. Constitutional Law ⇐90

Constitutional protection is extended to all discussions and communication involving matters of public or general concern without regard to whether persons involved are famous or anonymous. U.S.C.A.Const. Amend. 1.

4. Libel and Slander ⇐51(5)

Where statements contained in magazine article concerned issues of public or general concern, mayor who brought libel action could not recover damages under Missouri law of defamation unless there was showing of actual malice.

5. Libel and Slander ⇐48(1)

Missouri law recognizes qualified privilege in news media to comment on matters and persons of public concern so long as account is fair and not actuated by malice.

6. Libel and Slander ⇐93

Privilege granted news media to comment on matters and persons of public concern so long as account is fair and not actuated by malice is affirmative defense.

7. Constitutional Law ⇐90
Federal Civil Procedure ⇐1261

First Amendment does not grant reporters a testimonial privilege to withhold news sources, but to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into substance of libel allegation would be improper. U.S.C.A.Const. Amend. 1.

8. Federal Civil Procedure ⇐2461

Extreme nature of summary judgment does not lighten burden of party against whom motion therefor is interposed. Fed.Rules Civ.Proc. rule 56(e), 28 U.S.C.A.

9. Federal Civil Procedure ⇐2515
Libel and Slander ⇐93

Where there is concrete demonstration that identity of defense news sources will lead to persuasive evidence on issue of malice, district court in which libel action was pending should not reach merits of defense motion for summary judgment until and unless plaintiff is first given meaningful opportunity to cross-examine those sources, whether they be anonymous or known.

10. Federal Civil Procedure ⇐2465

There must be showing of cognizable prejudice before failure to permit examination of anonymous news sources can rise to level of error.

11. Federal Civil Procedure ⇐2539, 2547

Where mayor who brought libel action against magazine presented little more than series of self-serving affidavits to rebut magazine's showing that hundreds of documents were utilized in preparation of article and that all employees connected with article's preparation believed in truth of article with strong inference that there was good reason for belief, grant of judgment for publisher and reporter without permitting mayor to examine anonymous news sources was proper.

12. Federal Civil Procedure ⇐1264

Where published materials, objectively considered in light of all evidence, must be taken as having been published in good faith, without actual malice and on basis of careful verification efforts, compulsory revelation of news sources is not required.

◆

Mortimer A. Rosecan, Rosecan & Popkin, St. Louis, Mo., for appellant.

Harold Medina, Jr., New York City, and D. Jeff Lance, Robert S. Allen, St. Louis, Mo., for appellees.

Before VAN OOSTERHOUT, Senior Circuit Judge, and MEHAFFY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Alfonso J. Cervantes is the mayor of Saint Louis, Missouri. In May 1970 there appeared in appellee's Life magazine an article of 87 paragraphs accusing the mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article was entitled "The Mayor, The Mob and The Lawyer," and captioned with a comment explaining: "Both the mayor and his new crime commissioner have personal ties to the underworld." The substance of the article describes in some detail the relationship said to exist between Mayor Cervantes, Morris Shenker,[1] a Saint Louis criminal lawyer and then the mayor's appointee "to head [the] newly formed Commission on Crime and Law Enforcement," and Tony Sansone[2] who, according to the article, is "the mayor's liaison with the two mobs that run the St. Louis underworld."

Mayor Cervantes instituted this diversity libel action in the United States District Court for the Eastern District of Missouri seeking $2,000,000 compensatory and $10,000,000 punitive damages. He sought relief against and named as defendants the publisher of Life magazine and the reporter whose investigative efforts produced grist for the article.[3] He alleged in his amended complaint that 4 paragraphs of the article contained false statements which were authored, published, and communicated with knowledge of their falsity or, alternatively, with reckless disregard as to their truth.[4] The defendants answered raising both the defense of truth and constitutional privilege.

[1, 2] The mayor undertook extensive pre-trial discovery. He deposed the reporter who testified that he gathered information which formed the basis for most of the story from informants within the Federal Bureau of Investigation and within the United States Department of Justice. He revealed that these informants furnished him copies of confidential reports and orally transmitted additional and supplemental corroboratory information from which he constructed the events embodied in 3 of the 4 disputed paragraphs, but he refused, under repeated questioning, to divulge the names of the individuals from whom he

---

[1] Mr. Shenker is characterized by the article as "the foremost lawyer for the mob in the U. S." "His relations with some of the nation's top hoodlums, Life's investigations show, go far beyond legal representation." The article describes Mr. Shenker as "a brilliant organizer of labyrinthine business and financial schemes which dazzle and befuddle the government," and as one who "would have to do little more than to tell what he already knows about organized crime to go a long way toward breaking its back in St. Louis and several other places as well."

[2] Life has this to say about Mr. Sansone: "The man closest to Cervantes, as friend, business associate, campaign manager and unofficial but forceful influence around city hall, is Tony Sansone. A wealthy and socially prominent real estate and insurance man, Sansone is, to begin with, the son-in-law of Jimmy Michaels, a notorious gunman and gang leader whose record goes back to the shooting wars of the '20s in St. Louis. Michaels runs the Syrian Mob, an ethnic gang that co-exists these days as an 'ally by treaty' with the Sicilian Mafia family in St. Louis headed by Anthony Giardano. Michaels' general franchise is the gambling and bookie operations in south St. Louis. He is also the most effective entrepreneur in either mob in politics and legitimate business."

[3] The article was published under the reporter's by-line. The record reveals that although ultimate editorial responsibility for the article's content rested with Life's Associate and Managing editors, the reporter shared, with others, draftsmanship duties.

[4] The mayor bases part of his action on the prepublication press release which Life dispatched to herald the coming of the article. The complaint charges that this release was transmitted by the publisher to radio and television stations

extracted this information. That refusal was bottomed on the theories (i) that to assume a contrary position would be to subject his informants to retaliation or reprisals and physical danger; (ii) that compulsory disclosure of confidential sources would violate the First Amendment's freedom of the press by impeding the dissemination of news which can be obtained only if he, as a professional journalist, may effectively guarantee anonymity of the source; and (iii) that he, as a professional journalist and as a resident and citizen of the State of New York, possesses a statutory reportorial privilege to withhold the source of news coming into his possession.[5] The mayor promptly moved for

---

throughout Missouri and elsewhere to stimulate reader interest. The release invited and authorized the media to announce that the forthcoming issue of Life would report that its years-long investigation disclosed, *inter alia*, that Mayor Cervantes has business and personal ties with the gangsters that operate in Saint Louis.

[5] This aspect of the reporter's refusal is rooted in N.Y. Civil Rights Law, § 79-h (McKinney's Consol.Laws, c. 6, 1970). Subparagraph (b) of the statute provides, in subsrance, that a professional journalist shall not be adjudged in contempt by any court for "refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a * * * magazine * * * by which he is professionally employed or otherwise associated in a news gathering capacity." The law of Missouri recognizes no such privilege.

We have been referred to no New York cases defining the scope of this statutory privilege. Nor have we found a New York case affording precedent from which we can determine whether the statute draws a distinction based on the context in which the privilege asserted. But see People v. Wolf, 3[illegible] N.Y.S.2d 291 (Sup.Ct. New York County 1972), and In Re WBAI-FM, 326 N.Y.S.2d 434 (Albany County Ct.1971).

The scope of discovery permitted by Fed.Rules Civ.Proc. Rule 26(b) (1), 28 U.S.C.A. is limited to matters not privileged. This case presents the somewhat unusual situation where a deposition is being taken in New York for use in an action based on diversity of citizenship pending in a United States District Court sitting in Missouri, and the witness, a citizen of New York, claims a testimonial privilege not recognized in Missouri. In determining the validity of the asserted statutory privilege, a court is faced with the question whether to apply federal law or State law; and, if State law is to control, is it to be applied under the so-called *Erie* doctrine, see Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), or under Fed.Rules Civ. Proc. Rule 43(a), providing, *inter alia*, that evidence shall be admitted if it is admissible under the rules of evidence in the courts of the State in which the federal court is situate? Once these questions have been resolved, the court must determine whether to apply the law of the trial State or that of the deposition State.

This court long ago adopted the rule, said to comport with the "weight of authority", see Massachusetts Mutual Life Insurance Company v. Brei, 311 F.2d 463, 465–466 (CA2 1962), that State, not federal, law is determinative of evidentiary problems arising in a diversity case. See, *e. g.*, Bennett v. Wood, 271 F.2d 349, 351 (CA8 1959) (burden of proof); Severson v. Fleck, 251 F.2d 920, 923–924 (CA8 1958); and State Mutual Life Assurance Co. v. Wittenberg, 239 F.2d 87, 89–90 (CA8 1957) (burden of proof). Similarly, it is well-settled law that a federal diversity court must apply the choice-of-law rules of the State in which it sits, here Missouri. Klaxon Company v. Stentor Electric Manufacturing Co., Inc., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Applying these rules, we note that Missouri seemingly adheres to the generally accepted principle that the admissibility of evidence is governed by the law of the State where the testimony is to be heard. Rosser v. Standard Milling Company, Mo., 312 S.W.2d 106, 110 (1958), and Prentiss v. Illinois Life Ins. Co., Mo., 225 S.W. 695, 702 (1920). Thus, by this analysis, New York's law as to the testimonial privilege of a journalist does not apply, and the reporter is entitled to no protection on that ground. Compare Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y.1964). The same result would follow under application of the proposed Rules of Evidence for the United States Courts and Magistrates, albeit for different reasons. See 51 F.R.D. 315, 356, 358–360.

an order to compel disclosure of the identity of the informant[s]. The defendants responded by moving for summary judgment on the ground that each had acted in good faith in publishing the article and that both believed all of the allegedly defamatory statements to be true.

The District Court (The Honorable James H. Meredith, Chief Judge), did not reach the merits of the motion to compel. However, on the basis of a well-developed record consisting of affidavits, depositions, and other documentary evidence, it entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard for truth or falsity. 330 F.Supp. 936, 940 (1970). This appeal followed.

I

[3] In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), it was established that the First and Fourteenth Amendments' protection of speech and the press restrict the enforcement of State libel laws. *Times* accordingly held that a public official may recover damages "for a defamatory falsehood relating to his official conduct" only if he "proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280, 84 S.Ct. at 726. The holding of *Times* was reaffirmed and the reckless disregard aspect of its actual malice standard amplified in St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968). The Court said with respect to this aspect of the constitutional standard:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S., at 731, 88 S.Ct., at 1325.

It is clear, finally, that the conditional privilege granted by *Times* to false defamatory expression no longer is confined to statements concerning public officials. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), holds that constitutional protection is to be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*, at 44, 91 S.Ct., at 1820. Thus, "the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern." 403 U.S., at 44, 91 S.Ct., at 1820.

[4–6] Since the statements in suit are conceded by all to touch and concern issues of public or general concern, it is clear that Mayor Cervantes cannot, absent a showing of actual malice, recover damages under the Missouri law of defamation.[6] The District Court concluded, and the defendants here suggest, that because substantial editorial effort was expended to secure independent corroboration of the published materials, the mayor cannot meet the applicable constitutional standard of proof.

---

[6] Various aspects of the Missouri law of defamation have received the careful attention of this court in previous cases. See, *e. g.*, Ruderer v. Meyer, 413 F.2d 175 (CA8 1969), certiorari denied 396 U.S. 936, 90 S.Ct. 280, 24 L.Ed.2d 235; Underwood v. Woods, 406 F.2d 910, 915 (CA8 1969); Walker v. Pulitzer Publishing Co., 394 F.2d 800 (CA8 1968); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (CA8 1966); certiorari denied 388 U.S. 909, 87 S.Ct. 2097, 18 L.Ed.2d 1347; and Riss v. Anderson, 304 F.2d 188 (CA8 1962). The Missouri law recognizes a qualified privilege in the news media to comment on matters and persons of public concern so long as the account is fair and not actuated by malice. See *e. g.*, Moritz v. Kansas City Star Co., 364 Mo. 32, 258 S.W.2d 583 (1953). This privilege is an affirmative defense which must be

II

Without question the article fashions a broadside attack on the ability of Mayor Cervantes to perform responsibly in the governmental domain. It directs sharp and coarse comment both toward his official conduct and also his fitness for office. Indeed, the entire thrust of the article's message is that the mayor, despite public pronouncements to the contrary, seemingly possesses substantial personal and business interest in the perpetuation of profitable criminal activity in this city. Yet in the face of this massive attack on his fitness to occupy his important office, the mayor takes issue with but 4 of the 87 paragraphs comprising the article.[7] So far as the vast amount of the other material is concerned, its truth is either admitted or not explicitly denied. Thus, we are concerned here with only the comparatively few words said by the mayor to be false and defamatory, and as to these, he acknowledges that the burden is his to establish with "convincing clarity" deliberate or reckless error. *Times, supra*, 376 U.S. at 285–286, 84 S.Ct. 710, 11 L.Ed.2d 686.

Central to the mayor's appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources. He argues that in a libel case of this kind the identity of a reporter's sources is absolutely essential to the successful outcome of the lawsuit. His arguments in favor of compulsory disclosure may be summarized as follows: [a] disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; [b] through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; [c] disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and [d] disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity. Moreover, these particularized considerations are said to assume extraordinary importance when, as in this case, the information forming the core of the publication by its nature is not available to the public generally and is obtainable only from governmental employees who are under a duty not to reveal it to outsiders.[8] On

---

proven by the defendant. Walker v. Kansas City Star Co., Mo., 406 S.W.2d 44 (1966). See also Pulliam v. Bond, Mo., 406 S.W.2d 635 (1966).

[7] In his Reply Brief on this point the mayor asserts that most of the other material did not pertain to him. In the light of Mayor Cervantes' relationship with Commissioner Shenker, however, a fair reading of the record leaves us with the contrary inference.

[8] The reporter freely admits and positively asserts that certain key information used in preparation of the article was "leaked" to him by anonymous governmental employees. The mayor contends that the reporter helped himself to confidential information from governmental files and, in so doing, incited a violation of regulations designated as "Prescribing Standards of Ethical Conduct for Government Officers and Employees," issued by President Johnson under authorization of 3 U.S.C.A. § 301. Exec.Order No. 11,222, 30 Fed.Reg. 6469 (1965) provides in pertinent part, that

> "Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer,

the basis of these considerations, the mayor advanced arguments in the District Court that it should not reach the defense motion for summary judgment until he was given the opportunity to depose and examine the Federal Bureau of Investigation and Department of Justice employees who supplied Life's reporter with confidential reports and corroboratory materials used in connection with the article. The failure of the District Court to respond favorably to this plea is urged as error here.

These arguments in behalf of compulsory disclosure of confidential news sources, when urged on behalf of a public official whose reputation and integrity have been assaulted on the basis of information supplied by those sources, do not strike us as frivolous. Especially is this so when much of the information supplied by the anonymous informants has been obtained from the private files of Government. Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the identity of Life's news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth.

[7] We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources.[9]

> employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.
>
> "Section 205. An employee shall not make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

Purloined governmental documents have been before the courts before. See, *e. g.*, New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), and Dodd v. Pearson, 279 F.Supp. 101 (D. DC 1968). Compare Liberty Lobby, Inc. v. Pearson, 129 U.S. App.D.C. 74, 390 F.2d 489 (1968).

[9] The weight of decisional authority so holds. See, *e. g.*, Garland v. Torre, 259 F.2d 545, 548–549 (CA2 1958), certiorari denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231; State v. Buchanan, 250 Or. 244, 436 P.2d 729 (1968), certiorari denied, 392 U.S. 905, 88 S.Ct. 2055, 20 L.Ed.2d 1363; In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963); and In re Goodfader, 45 Haw. 317, 367 P.2d 472 (1961). See also, Adams v. Associated Press, 46 F.R.D. 439, 440–441 (SD Tex.1969); Application of Cepeda, n. 5, supra; Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D.Mass.1957); and Rosenberg v. Carroll (In re Lyons), 99 F.Supp. 629 (SD N.Y.1951). But see In re Grand Jury Witnesses, 322 F. Supp. 573, 576–578 (ND Cal.1970).

In two recent cases, however, it has been held that a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. Konigsberg v. Time, Inc., 312 F.Supp. 848 (SD N.Y. 1970), and Cerrito v. Time, Inc., 302 F.Supp. 1071 (ND Cal.1969), aff'd per curiam, 449 F.2d 306 (CA9 1971). Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality. Hence, each court seemed to reason that, absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants.

Finally, in Branzburg v. United States, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (Caldwell v. United States) (1972), the Supreme Court was asked to address the constitutional aspects of grand jury efforts to acquire from professional journalists information about possible law violations committed by their news sources. See Caldwell v. United States, 434 F.2d 1081 (CA9 1970), certiorari granted, 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109; In re Pappas, 226 N.E.2d 297 (Mass.1971), certiorari granted, *ibid*; and Branzburg v. Pound, 461 S.W.2d 345 (Ky.Ct.App.1970), certiorari granted.

But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws.[10] Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.

III

[8] Some twenty years ago, this court, in Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213 (CA8 1951), set forth the general policy of the circuit with regard to the entry of summary judgment. There it was said that:

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances." 189 F.2d, at 216. (Citations omitted).

Summary judgment, as the foregoing excerpt makes clear, is an extreme remedy to be granted only in those cases where there clearly is no genuine issue to be tried. But its extreme nature does not lighten the burden of a party against whom a motion therefor is interposed. Indeed, Fed.Rules Civ.Proc. Rule 56(e), 28 U.S.C.A., supplies the other side of the proposition recognized in *Black, Sivalls & Bryson.* In pertinent part, it is therein stated:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

This aspect of Rule 56(e) has been followed in prior decisions of this court, both in summary judgment cases generally, Lundeen v. Cordner, 354 F.2d 401, 407–408 (CA8 1966), and in First Amendment libel cases in particular, Hurley v. Northwest Publications, Inc., 398 F.2d 346 (CA8 1968), aff'g per curiam, 273 F.Supp. 967, 974–975 (D.Minn. 1967). It accords with recent constructions of Rule 56(e) by the Supreme Court, Adickes v. S. H. Kress & Company, 398 U.S. 144, 153, 160–161, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and First National Bank of Arizona v. Cities Serv-

---

ibid. It was held, over 4 dissents, that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. Noting that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," 408 U.S. at 682, 92 S.Ct. at 2657, the Court declined to exempt newsmen from the general obligation of all citizens "to answer questions relevant to an investigation into the commission of crime." *Ibid.* The Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense.

[10] Indeed, as the Court observed in *Caldwell*, n. 9, *supra*, "without some protection for seeking out the news, freedom of the press could be eviscerated." 406 U.S. at 681, 92 S.Ct., at 2656. Similarly, to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity.

ice Co., 391 U.S. 253, 288–290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), and it advances the important summary judgment objective of judicially assessing the proof to see where there is a genuine issue for trial.

[9, 10] Applying these rules to the case before us, the compulsory disclosure issue is drawn into clearer focus. Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pretrial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pretrial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion. The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice. *Hurley, supra,* p. 974 of 273 F.Supp.

[11] But such is not this case. As the opinion of the District Court makes clear, the record contains substantial evidence indicating that it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which the article was written and published. In turn, Life's key personnel, including one researcher, four editors and three lawyers, spent countless hours corroborating and evaluating this data. Once suit was instituted, the mayor was provided with hundreds of documents utilized in preparation of the article. He then deposed virtually every Life employee who possessed any connection whatever with the article's preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief.[11] To rebut this evidence, and to support his claim that 4 of the 87 paragraphs conveyed false information, the mayor was content to present little more than a series of self-serving affidavits from himself and from Mr. Sansone, together with other evidentiary materials which framed but a minimal assault on the truth of the matters contained in the four paragraphs. Aside from this evidence, he has not produced a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article. Neither has he come forward with competent evidence from which the District Court could reasonably discern the inherent improbabil-

---

[11] The single exception is this: one of Life's house counsel testified only that he had authenticated the genuineness of certain Government documents which had come into the possession of Life's reporter. He did not purport to pass on the truth or falsity of these purloined materials. This same employee formerly had served as Chief of the Department of Justice's Organized Crime section.

ity of the matters published. In short, the mayor's proof simply does not meet the standard traditionally required of one against whom a motion for summary judgment is interposed.

[12] We have mentioned long-standing decisions of the Supreme Court making clear that the mayor is obligated to demonstrate with convincing clarity that the materials he alleges to be defamatory were published with knowledge of their falsity or with reckless disregard for their truth. Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources.[12] Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment.[13] The judgment of the District Court must therefore be affirmed.[14]

Affirmed.

Luella H. MILLS, on behalf of herself and all other persons similarly situated, Plaintiff-Appellant,

v.

Elliot L. RICHARDSON, individually and in his capacity as Secretary of Health, Education and Welfare, Defendant-Appellee.

No. 768, Docket 71-2172.

United States Court of Appeals,
Second Circuit.

Argued June 7, 1972.

Decided July 14, 1972.

Action challenging constitutionality of procedures of the Department of Health, Education and Welfare to recover overpayments of social security benefits. The United States District Court for the Northern District of New York, Edmund Port, J., entered order dismissing action as moot, and plaintiff appealed. The Court of Appeals, Friendly, Chief Judge, held that such action was properly dismissed as moot on basis of facts that not only had plaintiff been promised return of withheld benefits, but issue of waiver of recoupment was to be reexamined under new procedures; however when facts were brought to attention of Court of Appeals which meant that should the court affirm the

---

[12] *Caldwell* makes clear that harassment of the press undertaken not for legitimate reasons is without justification. 408 U.S. 665, 92 S.Ct. 2646 (opinion of Powell, J.). To compel disclosure under the circumstances shown by this record would seem to constitute precisely the harassment *Caldwell* seeks to curb.

[13] Cf. Thompson v. Evening Star Newspaper, 129 U.S.App.D.C. 299, 394 F.2d 774, 776 (1968), certiorari denied, 393 U.S. 884, 89 S.Ct. 194, 21 L.Ed.2d 160; Markus v. Penn Mutual Life Insurance Co., 128 U.S.App.D.C. 368, 389 F.2d 538, 545, n. 9 (1967); and Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 968 (1966), certiorari denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548.

[14] The result we reach in the instant case is not to be construed as precedent for the proposition that news reporters are free to roam at will through the private papers of Government in search of a news story. We hasten to emphasize that through enactment of the Freedom of Information Act, 5 U.S.C. § 552 (1970), amending 5 U.S.C. § 1002 (1964), the Congress has attempted to strike the proper balance between the public's "right to know" and the Government's need for secrecy. We note this Act provides that all Government files are to be made available by publication, or otherwise, unless expressly excepted by one of nine carefully delineated exceptions. As to the exceptions, see § 552(a) (4), (b) (5), (b) (7).

United States District Court for the District of Columbia

Civil Action Nos. 1233–72; 1847–72; 1854–72

DEMOCRATIC NATIONAL COMMITTEE, ET AL., PLAINTIFFS

v.

JAMES W. MCCORD, ET AL., DEFENDANTS

[Filed March 22, 1973; James F. Davey, Clerk]

In re Carl Bernstein, Robert Woodward, Katharine Graham, Joseph Volz, Patrick Collins, Jeremiah O'Leary, James Polk, John Crewdson, Dean Fischer, Howard Simons, Movants, and the New York Times Company, Intervenor.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

I. BACKGROUND

This cause comes before the Court on Motions to Quash Ten Subpoenas issued and served on behalf of the Committee for the Re-election of the President (CRP), the Finance Committee to Re-elect the President (FCRP), Francis L. Dale, Chairman of CRP, and Maurice H. Stans, Chairman of FCRP, all of whom are parties in these civil actions arising out of the break-in on June 17, 1972, at the Watergate offices of the Democratic National Committee (DNC).[1] The subpoenas were issued to the Movants herein, who are reporters for, or managing personnel of, the *New York Times*, the *Washington Post*, the *Washington Star-News* and *Time* Magazine. In identical terms the subpoenas command the summoned members of the press to appear for depositions and bring with them all documents, papers, letters, photographs, audio and video tapes relating in any way to the Watergate "break-in" or other political espionage operations against the DNC and associated organizations and individuals; all manuscripts, notes, or tape recordings of communications during the period June 17, 1972, through November 7, 1972, with a broad range of DNC officials and employees, persons connected with the McGovern-Shriver campaign, the FBI, the Metropolitan Police Department, or the United States Attorney's Office for the District of Columbia; and all drafts, copies, and final drafts of news material relating in any way to the Watergate break-in or other political espionage operations against the DNC or connected entities and individuals. All of those summoned have moved the Court to quash the subpoenas; some of them have alternatively requested protective orders.

II. ISSUES

There are basically two issues raised by the Motions under consideration. The first is primarily a matter of procedure, namely, whether the subpoenas are so sweeping as to be unreasonable and oppressive and thus invalid under Rules 26 and 45 of the Federal Rules of Civil Procedure. The second issue is infinitely more important under the current state of the law and involves a fundamental constitutional right. Simply put, it is whether these subpoenas to the press are valid under the First Amendment to the United States Constitution.

III. DISCUSSION

A. *These Supoenas Are not so Broad and Sweeping as To Be Unreasonable or Oppressive, and Are Therefore Valid Under the Federal Rules of Civil Procedure*

Rule 26 of the Federal Rules of Civil Procedure contains the general provisions relating to discovery. It has long been held that the deposition-discovery rules are to be accorded a broad and liberal treatment,[2] and that subject to certain specific limitations, discovery is to be allowed as to any matter that is relevant to the subject matter of the action.[3] Despite this liberal policy, Movants argue that the subpoenas should be quashed under those provisions of Rules 26 and 45 which state that such action may be taken by the Court where the subpoenas would cause undue "annoyance, embarassment, or undue burden" or are "unreasonable and oppressive."

---

[1] *Democratic National Committee, et al.*, v. *James W. McCord, et al.*, Civil Action No. 1233–72; *Maurice H. Stans, et al.*, v. *Lawrence F. O'Brien*, Civil Action No. 1847–72; and *Maurice H. Stans* v. *Lawrance F. O'Brien* Civil Action No. 1854–72, were consolidated for purposes of discovery by Order of the Court dated February 16, 1973.

[2] *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

[3] 8 Wright & Miller, *Federal Practice and Procedure:* Civil § 2007.

The Court does not find the subpoenas so unreasonable or oppressive as to justify the action requested by the Movants. Under the theory that relevance is not to be measured by the precise issues framed by the pleadings, but by the general relevance to the subject matter,[4] it would be difficult indeed for the Court to find that none of the material requested by the parties is relevant, particularly at this stage of the proceeding. Further, it is well established that if the requested material is relevant, discovery should be allowed without regard to admissibility at trial.[5] The fact that the materials requested cover an extended period of time and are voluminous will not render the subpoenas invalid,[6] especially in view of the fact that the subpoenas are limited to a reasonable period of time and specify with reasonable particularity the subjects to which the requested materials relate.[7] It is therefore evident that application of these general principles precludes the granting of relief to Movants under the Federal Rules of Civil Procedure.

B. The Unique Circumstances and Great Public Importance of These Cases Compel a Finding by the Court That Movants Are Entitled to At Least a Qualified Privilege Under the First Amendment to the United States Constitution

Because of its finding that the subpoenas in question are not unreasonable or oppressive under the Federal Rules of Civil Procedure, the Court is directly confronted with a constitutional issue of the first magnitude. What is involved here is the right of the press to gather and publish, and that of the public to receive news, from widespread, diverse and oftimes confidential sources. Movants have supplemented the record with numerous and persuasive affidavits of prominent figures of the Fourth Estate which assert that the enforcement of these subpoenas would lead to the disclosure and subsequent depletion of confidential news sources without which investigative reporting would be severely if not totally hampered. The competing consideration is the right of litigants to procure evidence in civil litigation. Underlying that right is the basic proposition that the public "has a right to every man's evidence" and that, in examining any claim of exemption from the correlative duty to testify, there is the "primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."[8] These cases all are exceptional on the facts alleged and thus require particular scrutiny by the Court.

The Court is well aware that other courts in "civil" and "criminal" cases,[9] and the Supreme Court of the United States in a landmark case involving a newsman's testimony before a grand jury,[10] have been reluctant in the absence of a statute to recognize even a qualified newsman's privilege from disclosure of confidential news sources. In view of the decisions and circumstances present in the above-cited cases, it is instructive to note what is *not* present in the instant cases. These cases are not "criminal" cases, and even though they are primarily actions for money damages, their importance transcends anything yet encountered in the annals of American judicial history. Moreover, Movants are not parties to the actions, but have merely been called to testify and produce documents at deposition. The parties on whose behalf the subpoenas were issued have not demonstrated that the testimony and materials sought go to the "heart of [their] claim," as was found to be true in the case of *Garland* v. *Torre.*[11] What *is* ultimately involved in these cases between the major political parties is the very integrity of the judicial and executive branches of our government and our political processes, for without information concerning the workings of the government, the public's confidence in that integrity will inevitably suffer.[12] This is especially true where, as here, strong allegations have been made of corruption within the highest circles of government, and in a campaign for the Presidency itself. This Court cannot blind itself to the possible "chilling effect" the enforcement of these broad subpoenas would have on the flow of information to the press, and so to the public.[13] This Court stands convinced that if it allows the discouragement of investigative reporting into the highest levels of government, no amount of legal theorizing could allay the public suspicions engendered by its actions and by the matters alleged in these lawsuits.

---

[4] 4 *Moore's Federal Practice*, ¶ 26.56[1], p. 26–131 (2d ed. 1972).

[5] *Freeman* v. *Seligson*, 405 F. 2d 1326 (C.A.D.C. 1968); *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C. 1960).

[6] See *Brown* v. *United States*, 276 U.S. 134 (1928); *O'Malley* v. *Chrysler Corp.*, 160 F. 2d 35 (C.A. 7 1947).

[7] *Brown* v. *United States*, *supra*; *United States* v. *Medical Society*, 26 F. Supp. 55 (D.D.C. 1938).

[8] *Wigmore, Evidence*, § 2192, p. 70 (McNaughton rev. 1961). *See United States* v. *Bryan*, 339 U.S. 323 (1950).

[9] See, *e.g.*, *Garland* v. *Torre*, 259 F. 2d 545 (C.A. 2), *cert denied*, 358 U.S. 910 (1958); *Murphy* v. *Colorado*, (Colo. Sup. Ct., unreported opinion), *cert. denied*, 365 U.S. 843 (1961); *In re Goodfader*, 45 Hawaii 317, 367 P. 2d 472 (1961); *State* v. *Buchanan*, 250 Ore. 244, 436 P. 2d 729, *cert. denied*, 392 U.S. 905 (1968).

[10] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

It is of critical importance in these cases to note and bear in mind that the main purpose of the judicial system—a search for the truth—must be flexible in order to accommodate itself to the needs of our times and the needs of an individual case. The cases at bar are unprecedented in the annals of legal history and have raised more than one issue of first impression. In such circumstances, the Court is called upon to fashion a remedy consistent with the ends of justice. In proceeding to fashion a remedy in the instant cases, the Court remains in full accord with the language of Mr. Justice Powell's concurring opinion in *Branzburg* v. *Hayes*, in which he stated: [14]

"The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony . . . The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

The Court has noted the above constitutional interest—an interest which translates into nothing less than the problem of maintaining "an informed public capable of conducting its own affairs . . . ." [15] Against this interest must be balanced the interests of the parties to receive evidence going to the substance of their claims. Yet there has been no showing by the parties that alternative sources of evidence have been exhausted or even approached as to the possible gleaning of facts alternatively available from the Movants herein. Nor has there been any positive showing of the materiality of the documents and other materials sought by the subpoenas. In the face of these considerations the parties still insist that Movants in effect open their doors for inspection. The scales, however, are heavily weighted in the Movants' favor.

The recognition that Movants are entitled to a qualified privilege from having to testify under the circumstances of these cases is not totally without legal precedent. Thus, in *Baker* v. *F. & F., Investment*, the Second Circuit held that a reporter could not be compelled by civil discovery to reveal a confidential source who had informed him of discriminatory practices by sellers of homes in the City of Chicago. The Court stated: [16]

"[T]he [Supreme] Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure."

So also, Chief Judge Sirica of this Court noted in *United States* v. *Liddy* that considerations in civil discovery are vastly different from those in the criminal context and "First Amendment values will weigh differently." [17] And the *Branzburg* Court itself declared that "without some protection for seeking out the news, freedom of the press could be eviscerated." [18]

---

[11] 259 F. 2d at 550.

[12] Of equal importance is the necessity of a well-informed public which is fully able to participate in the political process. This has long been recognized by the Supreme Court to be a basic concern underlying the First Amendment's protection of freedom of the press. See, *e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

[13] See *Baker* v. *F. & F. Investment*, 470 F. 2d 778, 782 (C.A. 2 1972).

[14] 408 U.S. at 709–710.

[15] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969).

[17] Cr. No. 1827–72 (December 21, 1972), Mem. op., 9, n. 14.

[18] 408 U.S. at 681.

Moreover, the Court in no way wishes to imply that today's ruling constitutes the implicit recognition of an absolute privilege for newsmen. Such would clearly be improper under the *Branzburg* decision. It may be that at some future date, the parties will be able to demonstrate to the Court that they are unable to obtain the same information from sources other than Movants, and that they have a compelling and overriding interest in the information thus sought. Until that time, however, the Court will not require Movants to testify at the scheduled depositions or to make any of the requested materials available to the parties.

IV. CONCLUSION

In conclusion, the Court notes that the First Amendment entitles the public to more than a right to know. It also requires that any incursions into the areas protected by the Bill of Rights will be given a prompt judicial inquiry and hopefully one that will not only be sound but which the public will also understand and accept. Government generally and the courts in particular must always stand first in the vanguard of upholding the spirit as well as the letter of the first amendment freedom which are among the most precious of a citizen's fundamental rights. This is what this Court understands legitimate and necessary "strict construction" of the Constitution to be all about. This includes recognition of a special role for the press, for as written by James Madison:[10]

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy or perhaps both."

The Court will enter an order that the subpoenas be quashed.

Dated: March 22, 1973

CHARLES R. RICHEY,
U.S. District Judge.

STATEMENTS SUBMITTED FOR THE RECORD

STATEMENT OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE 20TH DISTRICT FOR THE STATE OF NEW YORK

As we discuss the vital issue of freedom of information, may I offer my own bill, H.R. 1735. Called an act to protect the confidential sources of the news media, it consists of one simple paragraph:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person connected with or employed by the news media or press, or otherwise engaged in gathering news material for publication or broadcast, can be required by the Congress or any court, grand jury or administrative body to disclose any information procured for publication or broadcast, whether or not such information is actually published or broadcast.

It is not quite as short as the First Amendment, but its implications for protecting freedom of the press may be as far reaching.

I wonder whether Richard Nixon recalls the significance of the year 1735.

It is a date of special meaning to lawyers like myself and to newspaper publishers and reporters who live by the principle of freedom of the press: 1735 was the year when the British colonial authorities placed on trial John Peter Zenger, a printer, editor, and publisher of *The New York Weekly Journal.* It was the first free press case in the history of our land. Zenger was accused of criminal libel. What he had really done was dare to run an article severely criticizing the Governor of the Colony of New York.

His lawyers were disbarred and he was left almost defenseless until a brilliant Philadelphia lawyer, Andrew Hamilton, came to the rescue. Hamilton argued in a powerful defense speech that Zenger had simply printed the truth and that the truth is not libelous. Zenger was found not guilty and the principle of free press took root and later became part of the first amendment, which, to me, as a civil liberties lawyer and an habitual lifelong dissenter, is the very soul of our Constitution and our democracy.

As a member of Congress, I have done my share of complaining at how I have been treated in the newspapers. I am always convinced that I could have written the article better or more fairly, but frankly, if I had to choose between a totally noncritical press and a totally and sometimes even painfully critical press, I would take my chances with the latter.

---

[10] 6 Writings of James Madison, 298 (Hunt ed. 1906).

I am not talking about freedom of the press as an academic issue. Unfortunately, it is at this moment a very urgent issue. We are in danger of losing it, in the television and radio media as well as in the printed media. One does not lose a free press overnight nor is what is happening necessarily obvious to the uninformed. It can happen insidiously, and I believe the current chill that is creeping over the media began several years ago when Vice President Agnew launched his campaign of intimidation against TV and the press.

The self-censorship, particularly in television, that followed has been evident even though no laws were changed. There are fewer news documentaries, fewer hard-hitting discussion programs, and so-called news shows are now expected to be entertaining rather than informative. The chill turned to frost when a Nixon administration spokesman recently linked a broadcast license renewal bill with a not-too-subtle warning to network affiliates to "jump on" the networks for alleged bias in network news programs. Otherwise, they were told, affiliates would be held responsible for whatever appeared in a network program.

I believe in balanced presentation of the news, but sometimes it's carried to absurdity.

On January 20, I was in Washington for Inaugural Day, but not at the ceremony installing Mr. Nixon. In fact, an extraordinary number of Members of Congress decided to stay home or go elsewhere on that day. I was at the counter-inauguration peace rally held between the Washington Monument and Lincoln Memorial, along with about 100,000 other people. We had a larger turnout than there was for the formal inaugural parade, but you would never have known it from watching TV or reading the press. And yet these 100,000 people who came on very short notice to their Capital to express their determination that this time there had to be a peace settlement were as much a part of the American political process as the officials sitting in the Inaugural stands.

Perhaps some of you read an editorial in the *New York Times* on January 26 called "Voices of Conscience," which said of America's "ill-fated involvement" in the war in Indochina:

> Now that the official protocols at least give hope that the killing and suffering may indeed come to an end, it would be an ungrateful act of instant historical revisionism to fail to note the contribution of the peace movement. That movement gave expression to a facet of the American character which ought not to be forgotten at the very moment when its prayers appear—at least temporarily—to have been answered and its goal approached.

It continues:

> Despite some excesses and abuses, for the most part the peace movement remained simply the conscience of a coalition: young and old, religious leaders and veteran politicians, idealists and pragmatists worked and marched under its banner.

And *The Times* concludes that recognition must be given now—

> To those who doggedly kept pointing and pushing toward peace. Many—particularly the young—never faltered in their conviction that peace was too serious a matter to be left to government.

And I might add that what goes into our newspapers and into our television programs is too serious a matter to be left to Government.

I spoke earlier of a present threat to the freedom of the press which has emerged as part of what I believe is the Nixon administration's attempt to keep our voices so low that they are, indeed, silent and the eyes of the press so closed that they will be blind to such scandals as the Watergate "bugging" conspiracy. It was the Nixon administration that attempted to restrain publication in *The Times* and other newspapers of the Pentagon papers which dealt the final blow to any illusions about the morality of the war. It is the Nixon administration that is increasingly using grand juries as fishing expeditions to obtain evidence that can be used in conspiracy indictments.

As you know, in recent months four reporters have been sent to jail for refusing to divulge information of a confidential nature to courts or grand juries, and at least a half a dozen others face jail sentences for defying court orders that they must reveal their sources of information.

According to President Charles Perlik of the Newspaper Guild—AFL–CIO—news reporters have been flooded with demands that they disclose their information, materials and sources not only to law enforcement bodies but to defendants as well.

In the first 2½ years of the Nixon administration, in fact, 30 subpenas were served on the *Chicago Sun-Times* and *Daily News* alone, two-thirds of them on behalf of the Government. One reporter, Duane Hall of the *Sun-Times*, was served in 11 separate proceedings within 18 months.

During the same 30 months 124 subpenas were served on NBC and CBS and their wholly owned stations, some by Federal and State prosecutors, others by defendants.

At the same time some news media managements began turning over files, containing published and unpublished photographs, verified and unverified, information, the names of sources, and so forth, to Government agencies—sometimes without any subpena being issued—without so much as the courtesy of informing the reporters involved. Some subpenaed reporters were also refused support by their publishers in resisting subpenas.

In this atmosphere of growing intimidation, the U.S. Supreme Court, on June 29, 1972, held in a 5-to-4 decision that the first amendment does not provide journalists with a privilege to withhold confidential information from a grand jury. The law does recognize certain confidential relationships, such as husband and wife, attorney and client, physician and patient, priest and penitent, but in three cases on which the Court ruled the majority held that:

> The Constitution does not, as it never has, exempt the newsmen from performing the citizen's normal duty of appearing and furnishing information relevant to a grand jury's task.

In his separate dissenting opinion, Justice William Douglas, who is the Court's most ardent champion of the first amendment, said:

> If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.

In their dissenting opinions, Justices Stewart, Brennan, and Marshall asserted that "the right to gather news implies, in turn, a right to confidential relationship between a reporter and his source." They pointed out that uncertainty about exercise of the power will lead to self-censorship and also held:

> The Court's crabbed view of the first amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The Court . . . invites state and Federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of the government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will . . . in the long run harm rather than help the administration of justice.

Although I have quoted at length from these dissenting opinions, it is the majority opinion that now reigns supreme, and it will do so until Congress enacts legislation to create a absolute newsmen's privilege. At present, several states have enacted some legislation that affords, in varying degrees, a testimonial privilege to newsmen. These laws are not uniform, however, and none of them guarantees absolute protection to a reporter who, if he is really to do his job, must be able to protect his sources.

So now we get back to 1735, not the year but the number, chosen by design, of a bill I introduced at the opening of the 93rd Congress and similar to a bill I introduced last June.

This is one of two bills in Congress that would create an absolute newsmen's privilege.

I find it interesting that just the other day Frank Stanton, vice chairman of the Columbia Broadcasting System, called for enactment of an absolute privilege bill. He said he had changed his stand because of the "dismaying and very serious assault that has devoloped in the courts and elsewhere, against newsmen's rights and the public's right to receive an unrestricted flow of information."

The heads of NBC and ABC have taken similar positions.

Although newspapers and magazines may not always look with favor on their TV competitors, I think this is one instance in which all the media share a common interest and common purpose. I hope there will be a nationwide effort by all the media to obtain this very crucial protection.

We in Congress cannot enact a law requiring the President to hold news conferences, a practice which seems to be withering away. We cannot require the President to submit to questioning by committees of Congress so that we can fully evaluate administration policies. But we can extend to the press the full freedom to do its job—to investigate, to dig out facts, to expose, to criticize, to arm citizens with the information they need to change Government policy if that is what has to be done.

The Times spoke of "voices of conscience." We still need them, and they will not be heard unless there is a free press. There is never a time when we do not need a free press, but there are times when we need it more than ever. We are in such a time.

Whether you agree or disagree with the policies of the Nixon administration, I think you will concede that there are many Americans who will be opposing some of its policies in the next 4 years. We do have a truce in Indochina at last, but only a fragile peace. The work of the peace movement is not ended. We will continue to demand limitations on the President's unprecedented and, I believe, unconstitutional use of power to make war and to conduct mass terror bombings. We will continue in Congress the move to reassert our authority and to cut off funds so that the President cannot send troops or planes back to Indochina if the civil war there is resumed.

And as the President continues to dismantle programs for the poor, for the ill-housed, for veterans, for child care, for medical research, for education, for antipollution measures, for human needs, while he pours money into military programs there will be the voices of dissent heard all over the land.

As Jefferson said—

"The people are the ultimate respository of all power."

And I would add, they cannot exercise that power without a free press.

STATEMENT ON THE NEED FOR A FEDERAL SHIELD LAW

(By Robert Bradsell)

I'm sure the meaning of the term FREE PRESS is understood by most citizens—certainly by most United States Senators. But the importance of a free press to the governmental system—and the consequent society—that has existed in this country for 184 years has apparently escaped the understanding of many, including some members of the press itself.

Today, a very real threat exists to the free press—as it does to a "free Congress"—from the executive branch. I don't mean to be pompous. There are parallels between the Congress and the press—and shared realities . . .

. . . The press, like Congress, is involved in investigating programs, procedures, policies, and people both in and out of government. The assumption of power—even partial power—by anyone over the investigative role can be devastating to either . . .

. . . The press, like Congress, can never fully agree on anything. The Congress, of course, has mastered the art of compromise. The press is inherently incapable even of that. Hence the assertions by some that the national press is controlled by a "northeast establishment" thought structure is nonsense.

The first amendment, with its "no law" provision, is a rather clear prohibition against any move to stifle the free press. There are complications, of course. The guaranteed right to an unhampered trial by jury is an often-quoted example. But the press, with a little help from a court order or two, has managed to function quite well alongside that guarantee.

To force disclosure of a newsman's sources, notes and "outtakes" parallels no guarantee to anyone. As Senator Ervin pointed out in his announcement of these hearings ". . . It is rather ironic . . . (that in those cases involving indictment of members of the press since the *Caldwell* and *Branzburg* decisions) . . . the end result has not been the discovery of evidence which has led to the jailing of a criminal, but rather the incarceration of newsmen whose reporting was responsible for bringing the misconduct to the attention of the public in the first place."

Such forced disclosure apparently guarantees but one thing: the stifling of the free press.

Since Senator Clark invited me to comment on the bills before you for your consideration, I've given much thought to the problem. There seems to be no comparable precedent for the need for such considerations.

There are strong arguments being made against any congressional "shield law."

The current Administration argues in favor of its own Justice Department "guidelines" on the subject. I consider this argument ridiculous. If the Administration of the 37th President can initiate such guidelines, what is to prevent the same Administration—or that of the 38th President—from eliminating or changing completely those guidelines? And, as several reporters could testify, the current guidelines don't seem to be working too well. Beyond that, the Justice Department's guidelines appear to be a piece of "non-permanent paralegislation" which hardly seems to fall within the purvey of that department's responsibilities.

Many members of the press argue against the shield law . . . and for some very good reasons:

1. . . . Any law designed to reinforce a constitutional guarantee inevitably includes conditions and arbitrary limitations on the guarantee . . .

2. . . . A test should be made based on the First Amendment alone, without the complications imposed by a follow-up law . . .

3. . . . Any law is apt to be the result of compromise, which could severely limit the First Amendment guarantee . . .

4. . . . Any congressional shield law would be declared unconstitutional at the first test—a very real possibility in the case of many existing state shield laws—because of the limitations just mentioned . . .

Bearing out my contention that a free press can never fully agree on anything, I disagree. In the first place, the First Amendment does not spell out a guarantee against forced disclosure—it merely infers it. And secondly, it's my feeling—and the feeling of many in the press—that the current threat of forced disclosure, and the consequent threat to a viable free press, is so great as to warrant a federal law specifying the guarantee. *I do not feel, however, that the four arguments listed above should be very carefully considered in the design of such a law.*

In commenting on the bills before you—or on those of which I am aware—I'd like to first to address myself to Senator Ervin's six points of consideration.

1. *Is legislation desirable?*

Yes. I think it is—for reasons expressed in my comments to this point.

2. *Should the privilege be absolute or qualified?*

Here I'd like to recall at least two of the arguments put forth by members of the press against passage of a federal shield law:

. . . Any law designed to reinforce a constitutional guarantee inevitably includes conditions and arbitrary limitations on the guarantee . . .

. . . Any law is apt to be the result of compromise, which could severely limit the First Amendment guarantee . . .

Any legislated "privilege", if not absolute, would have a tendency to fall into such a trap. The mere fact that qualification exist—and hence some mechanism for obtaining 'privilege'—would have a tendency to pressure many editors (if not reporters) into non-publication or non-broadcast of sensitive stories. And perhaps more importantly, such pressure would be felt most by those with the least wealthy, least influential organization behind them.

3. *Should the privilege apply to state as well as Federal proceedings?*

Ideally, I'd argue in favor of a bill designed to apply to both. It is after all in state proceedings where the threat of forced disclosure has arisen most often. It is also in state proceedings where members of the press most in need of protection, and prosecutors least inclined to restraint are to be found.

However—I'd consider this issue less important at this point than the others under consideration, and I'd be very much disheartened if an otherwise adequate bill should founder because of debate over federal/state vs. federal-only application.

If there is room for compromise at all in adopting a federal shield law, it is on this point that the compromising should be done. A federal precedent would make it all the more possible to successfully lobby state legislatures into following suit.

4. *To whom should the privilege apply?*

It is on this point, I feel, that the actual wording of a shield law bill becomes most critical. It must be precise—and it must cover all bases—if we are to escape complex and conflicting post-legislation interpretation.

Under the terms of some proposed state shield laws, such notable journalists as Thomas Paine and H. L. Mencken may not have been granted protection. Both men were, at times, essentially self-employed social critics—and would have been unable to prove primary employment for some minimum number of months or years with a ". . . regularly published newspaper . . . or periodical . . .".

A rather recent phenomenon in the press has been the emergence of the so-called "public access format". With the implied (and sometimes mystic) urgings of the FCC—if not those of local organizations—several broadcasters have embarked on a sometimes scary course in allowing *anyone* to speak out on almost any subject. The print medium has to a limited extent picked up on the theme also. As programs and columns of this sort increase in frequency, and as more attention is focused on them, more and more 'news' is likely to come out of them. Can you imagine the embarrassment to "the land of the free" should these citizens standing on a momentary soapbox suddenly find themselves being called on to disclose "confidential sources" and notes.

If a federal shield law is to prevent the need for special considerations due to some individual circumstance, or some as yet unused medium, then it had better make itself apply in the simplest and broadest terms possible.

5 and 6. *What qualifications, and what mechanisms?*

None. I share the feeling by many in the press that a law including "not obtainable by alternative means" or "except in cases of national security" clauses—or one which establishes a mechanism, no matter how elaborate, for obtaining or doing away with the newsmen's privilege—would prove to inhibit, rather than protect, the free press.

Recognizing an understandable tendency to not legislate unlimited privilege to any group, let me restate the argument that no shield law need interfere with the standard 'indictment after the fact' provisions of criminal law. A newsman who breaks the law should certainly remain liable for prosecution.

At this writing, three bills and one resolution are due to be considered by this subcommittee. All are, I'm sure, well intentioned. All contain commendable points. Two, however—S. 158 and S. Joint Resolution 8—appear most capable of accomplishing the 'newsmen's privilege' inferred in the First Amendment.

S. 36.—is, in my estimation, a poor bill. It gets itself in trouble immediately by attempting to "entitle" all those who might conceivably disseminate news to the public. Such an attempt is needless, in my view, and arbitrarily limiting.

More significantly, at the head of its section 3, "Except as provided in section 4 . . . ", the bill calls for a procedure enabling the removal of its own intended protection. Such a provision, if made law, would have a potentially stifling effect on the press . . . hardly the intention of Senator Schweiker, I'm sure.

S. 318.—is fraught with proposed conditions, and procedures for doing away with newsmen's protection.

The bill's section 7, subsection (c) is particularly bothersome. In its itemized mention of specific crimes and circumstances, it again imposes unnecessary and unwarranted limiting factors. The specific mention, paragraph (3), of cases " . . . involving classified national security documents or details ordered to be kept secret". I would have hoped to be seen as unnecessary in the wake of the reams of testimony and debate—and the Supreme Court decision on prior restraint—that came out of the Pentagon Papers case.

With all due respect to Senator Weicker, S. 318 is hardly in the best interests of a free press.

S. 158.—if passed intact, would indeed "insure the free flow of information to the public". It applies to anyone engaged in informing the public. It would undoubtedly protect scholars and pamphleteers, as well as those more traditionally thought of as "the press". And it inhibits itself least in its various definitions of terms.

As introduced by Senator Hartke, S. J. Resolution 8 is similarly all inclusive, and least encumbered by qualifying definitions and remarks. In the event S. 158 would prove "unpassable", Resolution 8 would be a most welcome substitute.

Unlike many, this nation can pride itself on its "constitutionality". It has guarded its document of foundation like a Bible—or perhaps more accurately, has allowed itself to be guarded by the document. The Constitution—added to, interpreted, re-interpreted, and at times stretched almost to the breaking point—has supported one of history's most amazing feats. It has permitted the existence of an "experiment in popular government" for an almost unheard of length of time—and it has done so through a period in history so marked by change as to be nearly incomprehensible to all but the phobic historian.

The United States of 1973 would appear as a piece of an alien world to a member of 1789's 1st Congress. There is but one common thread to which the sanity of such a hypothetically reincarnated congressman might cling . . . The Constitution.

Is this feast a tribute to those proxies of the people—the elected and appointed officials of government who have "managed" the document all of these years? In part, yes—but only in part. More, I think it is a tribute to those who framed the document to begin with.

If my reincarnated member of the 1st Congress happened to be James Madison, it would be all the more likely that he would maintain his sanity in 'such a strange place as this' by way of The Constitution. For after being so largely responsible for the charter document, he—in the spirit of a well worn editor—had the foresight to draft 12 recommended amendments to it. The ten that made it as the Bill of Rights are undoubtedly more significant—more relevant—more necessary in contemporary America than they were in 1791.

In his first amendment, Madison illustrates his understanding of the importance of a free press: ". . . Congress shall make no law . . ." abridging its freedom. Of course in his day, Congress was the only branch of government making laws.

A truly free press is a threat to no government that functions honestly and openly. And—as I said earlier—the press, like Congress, can never really agree on anything. Hence it is not about to control itself through any national board of review, "National News Council," or any other organization that the Twentieth Century Fund or any other group comes up with. But there is a very real attempt being made—subtle and indirect though it may be—to stifle, if not control, the press in this country.

Attacks on public broadcasting were at first cheered by some commercial broadcasters. But subsequent events have shown the threat to public broadcasting to be only a first step. And while the threat at first was seen by most print journalists as something to passively write about, administrative pressure on the press has succeeded—as Eric Severeid pointed out in his commentary several nights ago on the CBS Evening News—in uniting print and broadcast newsmen on this issue at least.

I'm currently involved in public broadcasting—in Des Moines, Iowa, scene of Mr. Agnew's landmark attack on the news media. The threat to public broadcasting is a frighteningly real one. **In a speech given two weeks ago the Consumer Federation of America in Washington, Robert MacNeil—Senior Correspondent for the National Public Affairs Center for Television—quoted Senator Ervin in a speech he had given:

"It was the intent of Congress in enacting the Public Broadcasting Act of 1967 which created an intermediary Corporation to receive funds for public television, to insulate control of programming from those who appropriated the dollars for it. It now appears that the intermediate agency is asserting the sort of political control which the Congress wisely denied itself."

The Corporation for Public Broadcasting (CPB), under the direction of its newly reconstituted board, has taken over most of the responsibilities for programming and operating the Public Broadcasting Service (PBS). In his speech, Robert MacNeil pointed out that ". . . PBS retained the most experienced broadcasting lawyer in Washington as outside counsel, Harry Plotkin, to advise them. His finding was that the Corporation was specifically and explicitly forbidden by Congress in the Act to run the system. In other words, the CPB takeover, is, according to this opinion, illegal."

Apparently CPB, or its counsel, would disagree . . . And apparently there is sufficient room in the Act itself for such disagreement. *It is my fervent hope that in considering proposals for a federal "shield law" bill, this subcommittee sees to it that such 'loopholes' are covered. It is further my hope that, should such loopholes appear in any shield law bill to come before Congress, it is defeated.*

Despite assertions of its massive power in the country, the press has proven weak in attempting to defend itself against the barrage of government threats. Its inherent tendency to disagree endlessly has shown the free press to be a threat to no one but itself, when it is itself threatened.

A controlled press is a different animal altogether. Madison obviously understood that what had originated in Mainz, Germany, with a semi-mass-produced Bible had, by his time, become a potential tool for mass persuasion and indoctrination. And even he could not have foreseen the potential effects of electronic media. A controlled press—no matter who does the controlling—can indeed become an ominous weapon. There is no lack of historical evidence proving the point.

Had Paul Joseph Goebbels not so efficiently controlled the German press in the 30s, the man behind him would not have so easily reduced that country's parliament to a joke.

It's been asked over and over about Nazi Germany. ". . . but where were all the good Germans?" They were exactly where all the good Britons and Canadians and Chinese and Americans are. Once anyone controls the press and the media, he controls to a large extent what the people know. And once he controls what they know, the people are in the palm of his hand . . . They have no choice but to follow him anywhere.

The threat of forced disclosure has surfaced as the most significant threat to the press in this country to date. In a day and age of such unprecedented executive power, the Congress owes it to the country—and out of its own self interest—to "shield" the "watchdog" in every way it can. Give us the shield law. And give us the shield law that works.

I thank you, gentlemen, for allowing me this opportunity to comment candidly and at such length. I hope I've not occupied too much of your time.

NOTE.—The entire text of the speech by Robert MacNeil—A Threat to Public Television—was entered in the Congressional Record for February 6, 1973, by Congressman Rees of California. I urge you all to read it.

STATEMENT OF PETER J. BRIDGE, JOURNALIST

My name is Peter J. Bridge. I have been a newspaper reporter for the past 13 years, on various newspapers throughout the Northeastern United States. My testimony is in support of a law granting absolute testimonial privilege to newsmen in federal jurisdictions, as well as preemptive legislation which would make the rule applicable to state jurisdictions.

I believe this form of privilege statute can be the only meaningful legislation in this area. Otherwise, as experience of recent months and years has dictated, the conditions, whatever they may be, will be used to evaporate the remainder of the shield.

Such was the case last year when I was held in contempt of court for refusing to answer some 50 questions before an Essex County, New Jersey grand jury. New Jersey statute grants a qualified privilege which would not apply in my case. The reason for that was a waiver statute which says that if a reporter reveals his source of information, then he may not claim the privilege, and must answer all questions put to him in any proceeding. The purpose of the waiver statute was never considered throughout the court proceedings: that it was intended to prevent a reporter, in the event he voluntarily decided to testify, from claiming the privilege when the time came for cross examination.

The article in question was written by me, and appeared last May 2 on the front page of the *Evening News* of Newark, New Jersey. In that article, as a matter of fact in the first paragraph of that article, I quoted Mrs. Pearl Beatty, a commissioner of the Newark Housing Authority as stating that an unknown man walked into her office and offered her a $10,000 bribe to influence her vote in the selection of an Executive Director of the housing authority. While Mrs. Beatty, on the day the article appeared in the newspaper, verified the accuracy of every single word of that article, she later was to relate several other versions of the story to the grand jury.

Prosecutor Joseph P. Lordi of Essex County had announced, even before the article appeared, that he would seek to empanel a special grand jury to investigate "alleged irregularities" in the housing authority. His incentive for this action came from statements forthcoming early in April from Mayor Kenneth A. Gibson to the effect that he, Gibson, "suspected that elements of organized crime" were at work to influence the selection of the Executive Director. Shortly after Mayor Gibson made that statement in a letter to then Secretary of Housing and Urban Development, George Romney, but *before* the publication of my article, others began making counter allegations.

Anthony Imperiale, a controversial personality in Newark, who had served as a city councilman, and who had been defeated in a primary election for mayor by Gibson in 1970, alleged that if there were corruption in Newark, it was in Gibson's office. He then related that the mayor had offered him (Imperiale) his choice in the appointment of a municipal judge in return for Imperiale's cooperation in lining up Housing Commission votes on behalf of Gibson's own candidate for Executive Director. Both parties began to demand a grand jury investigation, leading to some political embarrassment for Lordi, who was nearing the end of his term as prosecutor. In a sense, Lordi was forced to call for the special jury. But his motives were less than pure.

The prosecutor related to persons in his office that the jury would "investigate" and find no substance to either Gibson's or Imperiale's allegations. The jury would then return a presentment criticizing both officials (Imperiale currently serves as a State Assemblyman) for seeking to use the prosecutorial system and the press for their own personal political purposes. The irony of the presentment's substance is, of course, that the prosecutor, through the jury, was accusing Gibson and Imperiale of doing the precise thing he, himself was doing.

After the jury was empaneled, but before it began to meet, Mrs. Beatty made her statement to me, and I reported it in my article.

I have never denied that Mrs. Beatty was the source of that statement, but I have argued, unsuccessfully in the courts, that she was not the only source of information for that article.

At the time of publication, I was assigned as City Hall reporter for *The News*, with side responsibilities as an investigative reporter. I have held the same assignment for *The News* since February 1969, and achieved several successes in both areas during that time. For example: it was a group of articles by me (investigative) which eventually established the atmosphere in which the United States Attorney conducted a successful investigation into corruption in Newark, leading to the indictment and conviction of the incumbent mayor and several others; an article co-authored by me after eight weeks investigation led to the indictment and conviction of the former Speaker of the State Assembly, and a continuing investigation which led to other indictments, yet to be tried, and an investigation which led to legal processes against several liquor wholesale dealers in New Jersey for improper practices, to name a few.

I am sure the members of the committee are well aware, by former testimony that reporters, particularly investigative reporters, rely heavily on promises of anonymity to sources, in order to obtain information which the public has the right, or more properly, the need, to know. I am not unique in that sense, and was able to use confidential sources in all of the above cases to the extent that none would have ever been published without them.

These sources are "developed," usually over an extended period of time, and never come forth with needed information, I have learned, unless they have confidence that the reporter will not betray the identity confidence. Sometimes this means leaving out signal items, so long as they do not detract from the thrust of the news article, which might lead to the identification. (For example, if a newsman were to attribute some information to "informed sources in the office of the budget," and there were only one employee in that office, it would not take any profound imagination to determine the identity of the source.)

This interpolation on confidential sources is so that the members might better understand the basis for my decision not to testify fully before that grand jury last year.

I was summoned by the grand jury on May 19, some 17 days after my article appeared. The subpoena said I was to be asked questions "relating to a news story." Motions to quash were denied, and I appeared before the jury in the early days of June 1972. I answered all questions "relating to a news story," the story in question, of course. But I refused to cooperate with the prosecutor when he began asking me questions that went beyond the story. Those nonrelated questions, by the way, smacked of a fishing expedition made necessary by the fact, later verified by me, that the prosecutor had not even bothered to send a single investigator onto the street in this case. He sought to make me the investigator.

After my refusal to comply with the court's order to answer any and all questions, I was held to be in contempt of court and of the grand jury. I was ordered to jail until I answered the questions, or until the grand jury was discharged. By that day, July 6, 1972, the grand jury had been extended once, and was to be extended twice more, to October 30, 1972 to await the outcome of my appeals.

I entered the Essex County Jail October 4, 1972 and was released 20 days later, October 24, 1972. This was a week before the jury was due to expire, and ten days after the presentment was issued by the jury. With one exception, that presentment was exactly the same in substance as was predicted by the prosecutor in April. It was exactly the same in substance as related in a story about the presentment which appeared in my paper in June—before I was held to be in contempt.

The single exception was an item, inserted by the prosecutor, criticizing me for failing to cooperate with the "investigation." Incidentally, the prosecutor admitted to the press when the presentment was made public, that the document was essentially the same as the "draft" which was reported in June.

One of the things that neither the prosecutor nor the assignment judge of Essex County ever admitted, but which nonetheless is true, is that I was released a week ahead of schedule because of the wave of public opinion that inundated both of them. The public was outraged at their action, and one hundred per cent in concord with my actions. The public saw this thing as a giant erosion of individual rights.

I know this, because I was inundated by mail, also. Of the fifteen hundred or more letters that I received, not a single person took exception to my decision to stand my ground; and virtually every letter writer considered that I was their representative in this matter.

That public—those letter writers—were not only of New Jersey. Nor was the preponderance of mail from other newspeople, although the profession supported me well enough during those days. My mail came from housewives and truck drivers; from policemen and even prison inmates; from children, college students and old people. It came from every state in the union.

The press of this country has served the union honorably, and has served the country even longer than the constitution. An attorney once said to me that it was "difficult to know what the Founding Fathers meant when they wrote the first amendment."

I said to him, that it was not difficult for me to figure out. I simply go to the history books and read the things that were said by the likes of Thomas Jefferson and Benjamin Franklin. It was Jefferson who observed, when asked, that given the choice between government and no free press, and free press with no government, that he would "not hesitate to choose the latter." Franklin, one of our earliest patriots, and himself a newsman, noted once that "Whoever would over throw the liberty of a nation must begin by subduing the freeness of the press."

In every single case where a newsman has been jailed or threatened with jail, the courts have either found fault with the will of the legislature, or declared the legislature's action invalid because of personal preferences. I do not view such judicial action without a great deal of trepidation. When the pattern that has clearly emerged in recent years, of one branch nullifying the actions of another, which has been concurred in by the third, I cannot help but wonder whether our system of checks and balances has not gone awry.

In my case, the reader had to know that, even though one statement in the story had been attributed to a person with a name, other information was obtained from other sources. That term was used in the story. It was not a mystery. Furthermore, the courts observed, if I had not attributed that quote to that commissioner, but instead had used the term "anonymous source," then I would have never even been called before the jury.

In the case of William Farr, in California, the judge in my opinion, actually entrapped Farr, by telling him before the story even appeared, that he could not legally order its publication stopped. Neither did he attempt to force the identity of his source from Farr because, the judge told him, the California shield statute prohibited it.

Yet, seven months later, that same judge held Farr in contempt of court for refusing to comply with the demand of source identity.

Frankly, if the courts and the administration were as careful about treading on information rights of the people as is the Congress, I would not have any fears.

But this series of frivolous interpretations of law by the courts across the country indicates that their respect for individual rights leaves a great deal to be desired.

As I told you, in my case, I knew that the so-called "invesigation" constituted, not a bona fide action by a grand jury, but rather a political laundering operation by a prosecutor. Knowing this from the beginning, I feel that not only did I not allow the prosecutor of Essex County invade and destroy a free press, but I also did a citizen's duty by showing that he was not engaged in a legitimate mission, although he was using a time-honored institution, taxpayers' money and the color of official light.

The grand jury sits in secret session. While there are exceptions, in most states, only the prosecutor is allowed in the room. Whatever happens there is not supposed to be discussed on the outside, although the witness himself is not normally bound by this secrecy. If the grand jury finds reason to take action against one of the reporter's confidential sources after the reporter has appeared, then no amount of persuasive attempts will convince that source, and therefore other sources and potential sources, that the reporter did not contribute to the action. The resultant atrophe of information from sources which will no longer service the reporter occurs, not so much to the detriment of the reporter, who will probably retain his job, but it does affect drastically, the volume and quality of information made available to the public. This in turn encourages all manner of untoward action by public officials, who need not fear detection.

This harassment of the press in a conscious and open attempt to control the distribution of information to the public is not happening in a vacuum, any more than my subpoena to appear before that jury happened in a vacuum.

My case, and all those like it, are simply pieces in a much larger mosaic of intimidation and fiat that would place America's information dissemination system at the exclusive disposal of government and power brokers.

We have seen a proposed new code of evidence for federal courts that grants the source identity privilege to policemen, but abolishes the traditional doctor-patient privilege, and even the husband-and-wife privilege; only recently it was revealed that legislation has been introduced which would punish source and media for revealing information of corruption, ineptitude or incompetence in government if that information was classified "secret." In New Jersey, Governor Cahill vetoed the only meaningful legislation at the state level to pass on newsmen's privilege, giving a ludicrous rationale for his reason. But four days after that veto, Governor Cahill revealed his real reason for nullifying the action of a virtual unanimous state legislature: He wants to decide who will be a reporter. He told a gathering of the New Jersey Press Association that day, that if the law limited the role of press to daily newspapers, he would have no trouble. He suggested that the NJPA "certify and qualify" who would be a newsman.

I fear that government officials would all agree with the governor on that point. Anyone who could actually choose or challenge a newsperson's right to function, could control the press without any further intimidation.

But I hope I detect that even the U.S. Supreme Court would reject that practice, since it did state, in the majority opinion of *Branzburg* vs. *Hayes:* "Freedom of the Press is a fundamental personal right which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."

The court seemed to be reflecting that feeling when, on March 19 of this year, it ruled that even the much feared "underground press" in America has the same rights as the so-called "establishment" press.

To me this entire issue boils down to this question: Will the press in America be a *free* press, as guaranteed under the first amendment, or will it be a controlled press, such as in Russia, China, the Philippines, North and South Korea, and numerous other countries?

Unless my instincts are all wrong, I believe our press will remain free, albeit somewhat strained for a time. I know what the American people want, because so many of them have told me personally.

In addition to the stacks of mail I have received, I have traveled throughout the country in the last six months, listening even more than talking. There is a very real concern about the conscious and obvious erosion of personal rights in this country.

People are now beginning to see the connection between the warped philosophy that would conduct the Watergate bugging caper and that of a Justice Department that would argue before the United States Supreme Court that the FBI should be allowed, at his discretion, to conduct surveillance and wiretapping. The people are beginning to realize the link between the new rules of evidence and the so-called "secret document punishment" proposals. When the government is finished putting reporters in jail, it will start putting Congressmen in jail. When that task is completed, it will roam the countryside putting anyone it chooses in jail.

If that seems an overremotional fabrication, I would remind you that it happened in Germany, and it has, and is happening, right now, in other countries. But wherever it has happened, the free press has always been destroyed first.

I will relate to you a statement made not so long ago, and then tell you the author: ". . . the concentration of power can get to be a dangerous habit. Government officials who get power over others tend to want to keep it. And the more power they get, the more they want."

That paraphrase of a statement made more than sixty years ago by Justice Holmes was uttered over the airways only last October by none other than President Richard M. Nixon. How right he is.

The argument has been put forth that the first amendment prohibits the passage of shield laws because it states "Congress shall make no law . . ."

If that is what the first amendment means, then Congress has been acting unconstitutionally for 200 years, almost.

Another argument has been made, which I happen to agree with. That is the assertion that unless a shield law is absolute in nature, then the conditions or exceptions themselves constitute an abridgement of a free press, which is specifically prohibited by the first amendment.

To me, that means that Congress must pass an absolute privilege, or none at all, for half-measures will do no good on the practical level, and probably be declared unconstitutional on the legal level.

For those whose instincts tell them they have no business supporting a press which has, and probably will do them damage, I would say this: A free press comes in two forms—good and bad. A controlled press comes only in one form—bad.

Furthermore, under a free press, even the irresponsibility that does exist, exists at the whim of a variety of individuals. If the press is controlled, then that whim is concentrated in the hands of the administration—the man—who controls it. That is a powerful tool against dissent, even in Congress.

My experience has taught me that there are *very few* concrete arguments against adoption of an absolute shield to prevent forcible disclosure of sources or unpublished information. Those that exist are purely hypothetical. This means to me that the opponents of shield legislation must reach into their imaginations to find ammunition.

On the other hand, the arguments in support of shield legislation are case histories, concrete evidence, tangible material which tells what happens in the absence of proper shield legislation.

If the question becomes whether shield legislation interferes with the enforcement of other laws, we must, therefore, ask ourselves whether Peter Bridge interfered with the enforcement of the law by refusing to cooperate in a political venture; whether Bill Farr interfered with enforcement of the law by not allowing a personally-motivated judge work his violence on the free flow of information; and if a Joseph Weiler of Memphis, Tennessee interfered with enforcement of the law by refusing to cooperate with a state senate investigating committee that sought to hold him in contempt of the legislature after one of its members declared: "now let's see the troublemakers (newsmen) sweat." Weiler's crime, of course, was a series of articles in which he pointed out mistreatment of children in a home for mentally retarded, and then refusing to name his sources.

We have come to an era where form, to the abandonment of substance; where law and order, to the abandonment of justice, and where rhetoric without reason, has taken on too much weight.

We three above mentioned, and scores of others believe mightily, that we are serving the cause of substance over form, justice over law and order, and reason over rhetoric. It can be no different. We will, be going to jail as long as that is the only remedy available because, it is just as Benjamin Franklin said:

"They that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

If there were no need for shield legislation, I would not bother to say so. I believe that need is here, and I'm sorry that it is, because I truly believe the First Amendment provides that shield, no matter what the Supreme Court says.

If I felt only a conditions shield, applying only to federal jurisdictions were necessary, I would say so. I feel, however, that experience at the state level makes federal absolute and preemptive legislation necessary.

I appreciate the opportunity to make my views known to the Congress on this most serious matter. I hope my thoughts have had some value to the committee and to the Congress.

STATEMENT OF HON. HOWARD W. CANNON, U.S. SENATOR FROM NEVADA, SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

Mr. Chairman, I am honored to present testimony before this subcommittee on the subject of a testimonial privilege for newsmen.

I have co-sponsored S. 318, authored by Senator Weicker, which, it seems, is considered a conservative approach. I feel, however that the approach taken in this bill is the best one and I would like to tell you why.

I read with interest the recent remarks of your distinguished chairman, Senator Ervin, in the *New York Times* concerning this issue. He noted that there are four basic questions addressed in the numerous shield bills introduced in the House and Senate. These are whether the privilege should be absolute or qualified; whether it should be applied to only federal bodies or also to the states; who is a newsman; and, finally, what should be the procedural mechanism for invoking privilege.

Senator Weicker's bill seems to me to have addressed these main issues in the most comprehensive manner. It takes a stand on each of them and, according to my reading of the issues in this matter, takes the correct stand.

S. 318 was the first legislation to establish the principle that absolute immunity is desirable in some instances, while qualified immunity is the answer in others. To me, this is the only way to guarantee a free flow of information without depriving the principals in court trials of their right to their neighbor's testimony. I am aware of the argument that qualifying immunity in any way opens the door to unintended interpretations of that qualification. But we must realize that we are dealing with a political issue and politics seldom allows either side in an issue to prevail unscathed.

I found it instructive that the feeling of the House subcommittee that recently held hearings on this matter seemed to be that an "all or nothing" approach was improper. Even the *New York Times*, whose own reporter has become a central figure in this dispute, recently editorialized: "Absolutist laws, moreover, are always subject to the objection that not every case can be foreseen."

I support strong legislation to protect the public from government intervention in the free flow of the news. To me, it is not a great step from high-ranking administration officials complaining to network executives that a reporter dared to suggest inconsistency in some of the President's statements to turning grand juries into witch hunts of reporters' sources.

However, I hope this committee does not preclude positive action on this issue by seeking too much protection for newsmen. The public will not stand even the slightest hint of creating a special class of citizens, immune from delivering vital information in certain cases. But it will support a reasoned safeguard against improper use of newsmen's delicate relationship with his sources. I urge the subcommittee to work toward that safeguard. Thank you.

STATEMENT OF THE CITIZEN'S RIGHT TO NEWS COMMITTEE, MARCH 1973

The Citizen's Right to News Committee (CRNC) is a non-partisan and nonprofit association dedicated to protecting the public's right to news and to opposing efforts to force newsmen to divulge their confidential sources of information. Because this confidentiality is essential to maintain a free flow of independent, penetrating, and critical news to our citizens, CRNC supports a federal shield law which: provides an *absolute* shield to newspersons against compulsory disclosure of news sources or content; applies to investigative and adjudicative forums in both civil and criminal proceedings and on both state and federal levels.

Our Committee would like to present briefly to this Subcommittee our reasons for supporting an unqualified shield law, and ask permission that the CRNC's lengthier Position Paper on the protection of confidential news stories and information be placed in the printed hearing record.

I. FREEDOM OF SPEECH IN OUR SOCIETY

Freedom of speech is such a fundamental component of any democratic society that its importance needs little elaboration at this hearing. It is enough to recognize that no citizen can begin to exercise meaningfully his right of political participation without adequate debate and information. And in any complex society such as ours, individual citizens have no choice but to rely upon the press as the almost exclusive source of such debate and information.

This special role of the press as the means by which citizens gain enough information to make democracy work was recognized in the first amendment to our Constitution. The critical, constitutionally-protected mission of the press continues to be recognized in literally hundreds of court decisions; these cases have developed standards to insure the first amendment's grant of free speech by keeping the press unburdened from outside interference and control. These decisions rest on the premise that the press deserves special treatment only because it serves the ordinary citizen's need to know.

It is important to recognize some of the basic themes that run through these free speech decisions that have a direct bearing on the issue of a newsman's shield law. First, courts have recognized that free speech and a free press are fragile elements in any society. To maintain their vitality, they must be carefully protected from both direct and indirect "chilling" pressures. Second, the courts recognize that such protection is often only possible at the sacrifice of other, competing societal values. The Supreme Court has explicitly held that the use of government investigative and adjudicative proceedings must be limited in many instances in order to maintain free speech, and that under certain circumstances anonymity is a requirement of participation in the debate of a free society that deserves constitutional protection.

II. THE NEED FOR PRESS CONFIDENTIALITY

One of the many areas where the special requirements of the first amendment and other, competing societal interests conflict is the question of confidentiality of newsmen's sources and the information they collect. Such information is often admittedly useful, and at rare times, is of central importance to government officials as they perform investigatory, prosecutoral, and adjudicatory functions. Access to such information, however, would seriously weaken or destroy the press' function as a conveyer of news from the government and our society to our citizens. This is true because much news gathering in our society now depends upon sources that will not, for various reasons, provide this information if their identity is revealed. Studies of reporters' experiences, numerous affidavits of our most prominent journalists, and some of the recent most crucial and spectacular news stories of our times support the inescapable conclusion that, without the confidentiality of news sources, our citizens will be deprived of much of the most revealing information about their societies and the world.

And it should be recognized that the *best* kind of reporting about the most *important* type of news now depends, heavily and in some cases almost exclusively, upon confidentiality. The relatively recent development of indepth reporting and news analysis, the growth of news coverage of minority, radical, and fringe groups in our society, the attention to a new forms of dissent, dispute, and conflict in modern America, and the searching scrutiny of government corruption, distortion, waste, and secrecy all rely, and must continue to rely, upon confidential sources of information.

Government employees that know of hidden corruption or incompetence, radical leaders or groups that may threaten the stability of our society, persons who engage in new forms of protest or illegal behavior will not provide information to newsmen if their names will soon be revealed to their superiors or to the police. Yet, this is the very news that is so vital to the continued functioning of our democratic society. Our citizens must learn about governmental corruption, about dissent and radicals, and about illegal behavior if we are to maintain honest government, if we are to respond to our society's problems, if we are to deal with lawbreaking—in fact, if we are to survive as a democratic society.

The protection of the confidentiality of news sources is thus clearly required for the continued flow of crucial and meaningful news to our citizens. The alternative would be the disappearance of these news sources, cutting off our society's access to information about fringe groups, illegal activity, and government corruption. We would be forced to rely exclusively upon the official, self-serving press release version of government action and the police and district attorney's version of crime and dissent.

The American people would never have read about the *Pentagon Papers*, the Bobby Baker affair, the Thalidamide horror, the My Lai massacre, and much about the Watergate scandal if confidential news services were not willing to speak to the press. William Farr, news writer for the *Los Angeles Times*, who spent 46 days in jail rather than reveal a confidential news source, has described how two Pulitzer prize-winning stories about city corruption and the Watts riots could never have been written without confidential news sources. From the other testimony before this Committee this list of news stories could be made infinitely longer.

Even more destructive if this confidentiality were lost, would be that the prosecuting attorney, the civil litigant, and the investigating grand jury or legislative committee could, and inexorably would, annex the press, and turn it into an investigative branch of the government. This would occur not from unprincipaled design, but rather from the desperate need for information about and insight into some of the most troublesome problems of our time. But such misguided use of press information and sources would destroy the press' relationship with confidential sources, denying the information to both newspaper readers and government agencies. It also would, in the eyes of the informer and in the eyes of the public, undermine much of the independence of the press from government.

The availability of compulsory process against reporters is, obviously, open to easy and devastating abuse. The burden of providing voluminous notes and other material for discovery, the elimination of informants, the revelation of a news agency's most intimate and secret files and methods of operation, and possible incarceration of reporters for failure to cooperate are almost ideal tools for a government to chill or silence the press.

What better method is there for local, state or federal officials to halt investigations of corruption and misfeasance and to silence any subordinates who dare to speak to the press? What more ideal way is there for police or prosecutor to cover up corruption, inaction, or unknown areas of crime that threaten citizens? What better process is there for national leaders to keep hidden dissent and disagreement over its policies that exist both inside government and across the land?

III. THE PRESENT THREAT

If this discussion were to take place 20 or even 10 years ago, it would be considered by all but a few law professors and journalists as arcane and academic. But the events of the past few years have demonstrated that the conflict between subpoena and reporter is very real and increasing and that the threat to citizen's access to news through the press is now seriously threatened.

Other witnesses before this Committee have described this problem in eloquent, dramatic, and tragically-first hand detail; it is enough for us to underscore that there can be do doubt that the scope and frequency of use of compulsory process is burgeoning. Grand juries are increasingly turning to newsmen for confidential information, often spurred into action by the publication of particular articles. Legislative committees are issuing subpoenas. Private litigants, such as the parties to the Watergate cases, have requested sweeping discovery orders. Police have utilized search warrants to seize press notes and photographs; film and videotape of broadcast material and "outtakes" have been sought. Again and again newsmen have been sent to jail.

The underlying cause of this seeming assault upon the press is no doubt multifaceted. In part, it stems from the increased sophistication, depth, and impact of print and electronic news coverage, for the first time making available information and sources relating to sensitive and critical problems and, causing acute discomfort and embarrassment to government officials and private segments in our society. In part, this conflict arises from the deeper divisions and fragmentation of our society that have either grown from recent events or finally surfaced after having been long hidden from the public arena. And in part, the attitudes and practices of government officials have changed. Under increasing strain as divisions and unsolved problems mount, they naturally search out any information that can possibly help them. Once one official has used a subpoena to gain access to this new and potentially rewarding sources of information, it is easy for others to follow, and any internal restraints grown from a tradition of constitutional respect of the press are swept aside.

Finally, it cannot be denied that the traditional adversary roles of press and government have become more bitter with some government officials voicing unrestrained antagonism towards the value which underlie the First Amendment, encouraging others to disregard traditional rights associated with the press and to seek to weaken the independence and impact of our "Fourth Branch" of government.

The press reacted strongly to this invasion of what many considered a press right under the first amendment, and reporters have turned to the courts for protection. A few notable lower court decisions found some measure of constitutional protection under first amendment precedents against the compulsory disclosure of confidential news sources. However, the Supreme Court in the *Branzburg* v. *Hayes* decision of June 1972, rejected any press claim to Constitutional protection under the first amendment.

The majority opinion in *Branzburg* apparently relied heavily upon the assertion that the harm to the free flow of news from disclosure of confidential information and sources was highly speculative. We take issue with this approach by the Court's majority. First, never before in first amendment cases, especially those involving the chilling of free speech rights, was scientific proof and overwhelming documentation of harm a prerequisite of Constitutional protection. Indeed, the very nature of the free speech protection and the requisite absence of fear to exercise that right are necessarily difficult or impossible to quantify and to study.

Second, the undisputed assertions by knowledgeable newsmen that a significant part of news relied upon confidential sources was brushed aside by the Court, in spite of the fact that much of that news was the most significant to our society.

Finally, if the effect of any lack of constitutional protection was speculative at the time of the *Branzburg* decision, it cannot be now, for the reaction to the decision was a practical flood of sweeping subpoenas at all levels of government and more jailings of reporters, interpreting the decision as a signal to end any remnants of self-restraint.

The Reporters' Commitee for Freedom of Press has reported:

> While the current subpoena problem originated with federal grand juries and with state grand juries, the infection is spreading. Joseph Weiler of the *Memphis Commercial Appeal* and Joseph Pennington of radio station WREC were called before a state legislative investigating committee. Dean Jeniston, Stewart Wilk and Miss Gene Cunningham of the *Milwaukee Sentinel* and Alfred Balk of the *Columbia Journalism Review*. . . . were asked to disclose confidential sources during civil hearings before federal district courts. William Farr resisted a county judge's personal investigation into violations of his Mason trial publicity order.
>
> Three St. Louis reporters appeared before the State Ethnic Committee which appears to be some kind of executive committee authorized by state legislature to investigate state judges. Brit Hume of the Jack Anderson column and Benny Walsh of *Life* resisted libel case subpoenas.

And this list does not include the sweeping discovery of all material relating to the Watergate affair attempted of the *New York Times*, the *Washington Post*, *Newsweek*, *Time* Magazine, and the *Washington Star-Daily News* in the Watergate civil case.

Much as the CRNC believes that the First Amendment requires protection of newsmen's confidential sources, and that such constitutionally-sanctioned protection is ultimately necessary to assure to our citizens a free and adequate flow of information, we believe that the present attempts to subpoena information from newsmen, particularly in the aftermath of the *Branzburg* decision, demands immediate statutory protection for the press. In *Branzburg*, the majority of the Court invited Congress to act in this area; we implore Congress to accept this invitation to sustain every citizen's right to news.

IV. THE NEED FOR AN ABSOLUTE SHIELD LAW

The CRNC strongly believes that for any newsmen's shield law to be effective in maintaining a flow of news to citizens, it must grant an absolute right to newsmen to decline to reveal the source and content of the information they have gathered during the course of their work. The Committee takes that position because a qualified shield law will simply not work. As Professor Freund of Harvard Law School has stated: It is impossible to write a qualified newsman's privilege. Any qualification creates loopholes that will destroy the privilege.

We emphatically agree. Whether the qualification relates to the nature of the information such as national security or serious felonies, to the type of proceeding such as criminal trial or grand jury meeting, or to the importance of the information to such a proceeding, such as the "heart of the matter" test, or "crucial to a criminal conviction" test, it still can be expanded and will inevitably be applied to some crucial confidential information. Experience under the state shield laws demonstrates the hostility of many courts to such laws and the unlimited resourcefulness of prosecutors and judges in voiding their protection.

But, more important, the focus of a discussion on the merits of a qualified vs. unqualified shield law must rest upon the potental effect on the news source, for he or she is the key to the free flow of news. *The confidential news source must be reasonably assured that his identity will remain unknown or vital information will disappear.* If those sources grow quiet, the cause is lost and no elaborate law or procedure will be of any use.

We feel it is clear that only an absolute shield can offer reasonable assurance to a confidential source. No confidentiality that rests upon a future determination by judge or prosecutor about the relevance, importance and legal forum of a confidential shield will give adequate protection to a news source. Nor can these sources be expected to continue to rely for their protection upon reporters going to prison for long periods of time. And under present circumstances, it is unrealistic to expect these people to be comforted by the self-restraint of officials sensitive to the needs of the first amendment.

And once one source is revealed, no matter what the circumstances, all other confidential sources will understandably be afraid.

The recent testimony of reporters demonstrating the silencing of confidential sources and the cancellation of news stories depending upon these sources attests to the devastating effect of the sources' eroding confidence in their chances of remaining anonymous.

In this connection, it is important to understand that the overwhelming number of confidential sources relied upon by the press are not radical leaders or professional criminals, but rather they are dedicated and hardworking bureaucrats. They speak to reporters because they disagree with their superior's policies, because they see dishonesty or corruption uncorrected, and because they feel the public should know what is going on. Admittedly, some are acting selfishly; others act as patriots. What is important is that these individuals are *indispensible* to keeping Americans informed about how the state and federal governments are operating—or failing to operate. In many cases, they are the only access to information that is improperly hidden from the public. And they are practically the only effective deterrent to corruption.

These people know that their fellow workers and superiors will act to silence them. They understand that their jobs or careers will vanish if they are discovered. They stand to lose a job that supports a family, children's education, and a mortgage. With such a risk and certain retaliation if they are ever discovered, how many will speak up depending upon an uncertain decision by a judge on the question of materiality or national interest? The answer is plain.

This point is so obvious and compelling that most opponents of an absolute shield law readily concede it; they assert, however, that the costs of such an unqualified shield law to the proper functioning of the criminal justice system are too great. The CRNC believes that a careful examination of these "costs" to society of a shield law are highly exaggerated and, in fact, they do not represent a significant loss to our criminal system at all.

In the setting of an investigatory proceeding, either of a grand jury or a legislative committee, the so-called public costs of an absolute shield law are, upon reflection, insignificant in comparison to the first amendment values involved. Many confidential news sources are concerned with matters of bureaucratic policy or social protest that do not involve criminal behavior. Those that do involve criminal behavior often focus upon official corruption. The denial of the source of the information that first revealed the existence of this corruption cannot realistically be deemed an insurmountable barrier to a grand jury or legislative committee from using its broad subpoena powers to investigate the principals involved. Of course, it would be easier to force the source to point the finger, but such a saving of effort would merely cut off all future sources and serve to protect corruption in the future. Nor does the denial of such a source inhibit such a body from exonerating individuals from inaccurate accusations.

The fact that confidential informants use the press to expose corruption is, in itself, a great weapon against crime: it deters such behavior, and it forces responsible officials as well as prosecutors to act.

The same analysis applies to information published about serious criminal activity outside the government, either by organized crime groups or radical political groups. The knowledge gained by society and the investigating body far outweighs the *additional* information that would be gained from the appearance of the informant and the cost of losing such informants in the future. In these cases, exposure of the informant can mean a serious threat to him. It is not sensible to sacrifice this potent force for exposing criminal behavior merely to add one witness, much of whose testimony is already revealed, to the evidence that the entire criminal justice system is capable of adducing.

Reports of another type of criminal activity have been sought by subpenas—new forms of social activity by fringe groups or normal citizens who violate criminal standards of behavior without threatening grave harm to the society. Most of these reports focus upon activity such as drug use by youngsters, new forms of sexual activity, the widespread use of illegal abortions, etc. These reports raise vital questions about our society that should be considered and that citizens should know about. In these cases, the society's need for these investigative bodies to have the names of sources, who are likely to be individual examples of widespread violation of these laws, is not as great as the society's need to know that these activities take place at all.

In addition to the fact that revelation of confidential sources to investigative bodies would clearly cost the society more than it could possibly gain, the news media are particularly susceptible to damage from these investigators. The scope of their inquiries are broad and the limits on their subpoena powers very narrow; they would naturally seek to gain as much information as possible from a reporter, exposing all of his information and sources in a "fishing expedition" that is certain to destroy any future confidential sources in that entire area.

The cost to society of an absolute shield law in criminal trials is similar to that discussed relative to investigations, except the proximity to actual criminal behavior and its punishment is much greater. But again, an analysis will demonstrate that society loses very little in such a situation.

In the case of government corruption or private criminal acts, it is improbable to the extreme that the confidential source of information will possess the only evidence needed for conviction. Even in cases where individual isolated criminal acts are involved, this is rare. In fact, in all of these cases, the confidential newspaper source plays the precise role that the widely used and accepted police informant does—except the press source also plays a vital function in delivering news to our citizens.

And the plain facts are that the overwhelming number of confidential sources are not discussing criminal activity at all; of those that do, rarely are they themselves criminally involved. Serious criminals simply do not confess to reporters, nor do they invite reporters to witness murders, rapes, burglaries, or espionage. And if reporters do learn of such serious crimes they are unlikely to agree to keep confidential the names of the perpetrators.

Finally, even under an absolute shield law, in the rare and extraordinary case where a reporter does learn in confidence of the identity of felon, or of a person about to commit a felony, that reporter can weigh the societal interest himself and come forward and break confidentiality when manifest injustice would otherwise occur.

These rare, hypothetical dilemmas exist more in the minds of many who oppose a shield law than in the courthouses of our country. They are clearly outweighed by our citizens' right and need for news. In making this balance between the first amendment and the criminal justice system, we should compare other evidentiary privileges now existing. The doctor-patient privilege justified to ensure that doctors can effectively treat their patients, and the lawyer-client privilege, justified to ensure the proper functioning of an adversary legal system, protect interests that are clearly no more important in our constitutional system than a key part of the first amendment. And these privileges are much more likely to prevent crucial evidence of criminal conduct from being revealed.

Thus, in making the balance between the need to protect confidential sources to provide our citizens with a free and adequate flow of information and the benefits that may occasionally accrue to our criminal justice system, CRNC feels the scales lean overwhemingly to the side of the first amendment. We would not sacrifice the Pentagon Papers or knowledge about the Watergate affair; we would not give up the repeated exposures or widespread corruption in government at all levels; we would not cut off our few insights into the behavior of fringe radical groups, of the activities of the Mafia, the illegal abortion trade, or the venereal disease epidemic in our youngsters. All this could be lost for the uncertain and unlikely need for a witness in few criminal trials.

Never before have our citizens needed so much the news that is provided by confidential sources. Never before has this news source been so threatened. It must be protected. And it only can be protected by an absolute shield law. We respectfully urge this Committee and Congress to support such a law to vindicate the first amendment rights of all of our citizens.

Statement by the Executive Board of the Communications Workers of America

THE RIGHT TO KNOW

Never, since 1787, has the right of the public to know about public business been under so strong and concerted an attack than during the present time. This is an attack on a principal guarantee of the Constitution.

A little at a time, the administration has resorted to broadside attacks on the right of the news media to analyze and criticize the operations of government. The administration seems to be following the line of the present military government of Greece, which nominally guarantees a "freedom of the press" but in fact cracks down on the news media which "abuse" their "freedom."

The most sinister development in the United States is the attempt to compel persons engaged in newsgathering to reveal sources of information. The practical effect of such disclosure of sources would necessarily be to stifle free expression.

When the Constitution was adopted, there was wide controversy over the question of freedom of the press. At that time, various segments of the press were carrying on scurrilous attacks on public officials, even including George Washington. The Constitutional Convention of 1787 at first rejected a provision to guarantee inviolable freedom of the press. Subsequently, as a capstone of the Bill of Rights, the Convention provided for the free press, to help ensure against abuse of power by government.

The situation in the early 1970's has become so serious that the Congress is looking into legisaltion to define, once again, the doctrine that the free flow of information must be unrestricted. The Judiciary Committee of the House of Representatives and the Senate are hard at work on legislation to prohibit government agencies from compelling disclosure of source materials. The proposed bills run from total privilege of the newsgathering persons to a "qualified" privilege.

A major reason for the intense interest within the Congress for legislation to protect the media is a series of federal and state court decisions in the last 3 years. News gatherers have been summoned before grand juries to produce mental and written notes, still film negatives, and film and tape "outtakes" not used in broadcast programing. Some news media representatives have been incarcerated because they were protecting news sources; the reason offered by government for jailing of reporters has been the implication that justice was being obstructed.

The United States Supreme Court in June 1972 threw over longheld tradition and established precedent by its decision in *Branzburg v. Hayes*, thus deciding on a 5-4 vote that an investigative reporter must disclose to a grand jury information gathered in the course of his duties. The tradition and precedents date back to Thomas Jefferson, James Madison and Alexander Hamilton through the "Pentagon Papers" case against the *New York Times* in 1971. In all of those, the weight of decision had been toward untrammeled disclosure of information vital to the public's right to know about its business.

Among the many bills the Congress presently is examining on the subject of legal privilege for newsgatherers to protect sources and continue to report the public's business without harassment are those introduced by Representatives Ogden Reid and Jerome Waldie and Senator Alan Cranston. Congressman Reid's bill would provide for unqualified and total privilege for reporters, so that they might not be required to abridge the first amendment's rights in proceedings before the Congress, federal courts and agencies. The Waldie-Cranston proposal would extend the unqualified privilege to reporters in all federal and state proceedings.

The Executive Board of the Communications Workers of America subscribes to the principles of the Reid, Waldie and Cranston proposals. This Board does not draw stringent distinctions between the Reid and the Waldie-Cranston proposals, since the basic right of news media must in the end be determined by the Federal court system—which is, and must continue to be, governed by the United States Constitution as a result of the decisions taken by the Constitutional Convention of 1787.

The CWA Executive Board, moreover, condemns the trend toward stifling of information attempted by government at all levels by whatever pretext employed.

The CWA Executive Board urges the Congress to enact legislation for unqualified privilege in terms sufficiently clear that the declarations of the nation's founders in 1787 may be fully honored in the 1970's and beyond.

STATEMENT OF WILLIAM EGINTON, IOWA CITY PRESS-CITIZEN

COMMENTS ON NEWSMEN'S PRIVILEGE

My view today is that absolute, unqualified protection for newsmen has become essential to maintain the free flow of information to the people. And I recognize that abuses may follow.

This conclusion was reached reluctantly, after the decision in the *Caldwell* and related cases last June and the increasing harassment of newsmen that subsequently developed. The insidious nature of such harassment lies in its capriciousness. It inhibits public access to information through the press more than do overt actions or threats of them.

Until last fall, my feelings always had been that the greatest protection a citizen, or a reporter as a citizen, could have developed from the general presumption of a public right to information about his government. This right was founded, if seemed to me, not only in the first amendment protections in the U.S. Constitution but also in the ninth amendment (and comparable sections—2, 7, and 25—of the Iowa Constitution for citizens of this state).

Such Constitutional guarantees, protected by the courts, always seemed to me stronger than more specific legislation for two reasons:

Legislation once passed also can be repealed and the courts could hardly overlook the implication of such repeal.

Legislation providing protections intended to guarantee a minimum standard in this area of access to information tends in implementation by administrators to become a maximum. Rather than opening doors, they leave them only slightly ajar.

Recent developments, however, have caused a complete change in earlier views. Current legal precedents do not provide protection; perhaps adequate legislation can.

The changes in society, in government, in journalism which have led to new situations are known and documented when they reach a climax drawing national attention.

However, not only the harassment of a reporter who seeks to be something other than a cheerleader for a government, but also the effects in a local situation may be less familiar. Local officers in Iowa have taken their cue from court decisions, both as a means of attempting to inhibit newsmen in their work and thus the public in obtaining information and as a means of locating sources of information.

Twice in the past two years, reporters for this newspaper have been threatened with subpoenas to testify in proceedings when only information they could have provided was the source of material published. On another occasion, a reporter for the *Press-Citizen* was singled out for arrest and removed from the scene of a campus disturbance. This action deprived persons depending upon this newspaper of information of concern to them and forced them to rely solely upon an official report from participant—and rumor. In all these instances our attorneys obtained a result favorable to us and to the public. But why should we be compelled to invest time and money to protect what is guaranteed by the Constitutions of the United States and of Iowa.

Harassment, thus, is the continuing threat. And it is a threat in Iowa City as in Washington, or Newark or San Francisco on matters of local, as well as of national significance. It is a threat because officials at any level may seek to prevent information of consequence to a free society from reaching the members of that society.

The thrust of recent court decisions and official actions has been to strengthen those who would obstruct the free flow of information and to impede reporters who seek to fulfill their responsibility of informing the public. A legislative enactment by Congress would contribute to reversing that trend. (State legislation would be almost as effective as a statement of public policy and likely more effective practically.)

Specifically, of the measures I am somewhat familiar with, that of Senator Cranston (S. 158) is preferable. The Schweiker and the Weicker bills provide qualified privilege which has not provided protection for the public's interest. Joint resolutions addressed to a problem seem to be of little effect.

STATEMENT OF DICK FOGEL

I offer these remarks on shield legislation as an interested citizen who has been a professional newsman for the past 25 years. At present I am Assistant Managing Editor of the *Oakland* (Calif.) *Tribune*. Last year I was chairman of the National Freedom of Information Committee of the professional journalistic society Sigma Delta Chi. In that capacity, and previously as chairman of the California Freedom of Information Committee, I have made an intensive study of shield law problems. I would emphasize that the following are my personal views and not necessarily those of the aforementioned organizations.

I would strongly urge that Congress, in attempting to draft appropriate shield legislation, not overlook some basic things about the Bill of Rights.

We know from history, that the Bill of Rights was created to provide a shield—a shield to protect the individual and the people at large from abuse of power delegated to government under the newly created Constitution.

We know from events which precipitated its adoption that there was an intention to prevent censorship and secure the right of free expression for all citizens.

There is a seldom noticed introduction or preface to the Bill of Rights which gives up explicit knowledge of the purpose.

This preface is not included in printed versions of the Constitution but it does appear at the start of the original Bill of Rights on display at the National Archives. It says:

"The Convention of a number of the States, having at the time of their adopting the Constitution, expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benificent ends of its institution.

"Resolved . . ."

This, I believe, gets to the heart of the issue.

The Bill of Rights established the place of the individual against the Government in a way which makes our American democracy unique. Its framers not only guarded against abuse of government power; they knew and stated that the enumerated guarantees would extend "the ground of public confidence in the Government."

Stressful events of recent times have led to strong assertion of these individual rights of free expression by citizens bent upon effecting change. The Government, reacting, has come down hard on the press in a struggle over acquisition and dissemination of information.

It has never been more clear that the press has a vital and essential role—which is to keep the public thoroughly informed about the operation of its institutions and to maintain a free flow of information providing the valid news and diverse views so necessary in a democracy like ours.

But, I see significant danger in legislation which attempts to define who is a newsman and who isn't. The definition could develop an implicit form of censorship if it were too narrow. If it were too broad it would set up a class privilege permitting all kinds of people to take on the stripe of a newsman for their own purposes.

Any class legislation would set the newsman apart from the rest of the population, and that would render him less effective than he is now.

Why not instead act to protect his function?

That's what the original California shield law did.[1] It required the fact of publication or broadcast before refusal to reveal a confidential source could be asserted. If this approach were used, *anyone* who authored information which was published or broadcast would enjoy the same right.

---

[1] Section 1070 of the California Evidence Code, passed in 1935, said: A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper. Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television.

I would respectfully suggest that this could be Part I of a dual shield law. It would provide absolute protection of the newsman's confidential sources.

Part II would be a carefully drawn conditional statute extending protection against subpoenas which (1) are aimed at obtaining news information related to or beyond the scope of a published or broadcast story, or (2) seek information acquired in the general course of newsgathering but not published or broadcast

This would be implemented procedurally through a judicial hearing which would provide a determination on an individual case basis. Although it again raises the question of definition, eligibilty of the newsman or news organization could also be related to function, i.e., the information sought was acquired in the course of gathering or obtaining news intended for publication or broadcast.

Part II would provide a defense which does not presently exist against the cumulative or aggregate effect of many subpoenas which is so stultifying to news production.

It would protect the right to edit and prevent news organizations from being turned into investigative arms of the government.

It would not put the newsman above and beyond the law but instead place the burden of proving the absolute need for testimony upon anyone who seeks information from a newsman or news organization.

A subpoena to appear and testify before a grand jury or other governmental investigative body would be quashed unless it were proved at a hearing that the information was unobtainable by other means less destructive of first amendment rights, *and*—that there is probably cause the protected person has information clearly relevant to a specific probable violation of the law, *and*—that there is a compelling and overriding national need for the information.

These are similar but not identical to qualifications already suggested in other proposed laws, including a bill introduced in August by Senator Walter F. Mondale of Minnesota.

It may be noted that his measure did not prohibit disclosure of a source of allegedly defamatory information where a defendant asserts a defense in a civil action based on the source of such information.

One of the most difficult questions connected with shield legislation is how to handle situations wherein newsmen obtain knowledge of crimes or actually witness them. I would think in most cases they should testify provided there was not a confidence involved and doing so did not impair the newsman's ability to function as an investigator. Practically speaking, however, reporters often have knowledge of crimes for a considerable period of time before they are able to disclose them in stories. On other occasions they may receive anonymous warning of an impending crime, and almost invariably they will pass such information along to the proper authorities.

I have two other observations: I feel immunity, when asserted, should extend to reporters' notes and tapes, unpublished photographs and/or negatives, television outtakes and telephone records. The sanctity of all is essential to protection of the editing function. Congress should do whatever it can to protect the media from search warrants. United States District Judge Robert F. Peckham, ruling in a California case now on appeal, declared that "a search warrant presents an overwhelming threat to the press's ability to gather and disseminate the news . . ."

Finally, to summarize all the foregoing, let me repeat this comment of Dr. Alberto Gainza Paz:[2]

"The freedom which the newsman wants and needs is not a freedom restricted to his own profession, nor is it a privilege for editors alone. What journalism defends is the right of all men to get information and share opinion."

Thank you for this opportunity to offer my views.

Statement of Albert E. Jenner, Jr., of the Chicago and Illinois Bars,
March 14, 1973

I am Albert E. Jenner, Jr., a long time member of the Illinois and Chicago Bars. I am past President of the Illinois State Bar Association, the American Judicature Society, the American College of Trial Lawyers, the Illinois Commission on Uniformity of Legislation in the United States, and the National Conference of Commissioners on Uniform State Laws. I have been a member of the House of Delegates of the American Bar Association since 1948 and was for four years Chairman of its Standing Committee on the Federal Judiciary. For ten years, 1960–1970, I was a member of the United States Judicial Conference Advisory Committee on Federal Rules of Civil Procedure. Since March, 1965, I have served as Chairman of the Judicial Conference's Advisory Committee on Federal Rules of Evidence. Those Rules were recently submitted to you distinguished members of the Senate by the United States Supreme Court.

---

[2] Speech to the American Society of Newspaper Editors, April 19, 1952.

During my good many years at the Bar, I have been primarily a litigator trying cases, civil and criminal, of infinite variety in the state courts of Illinois and many other states and in the federal district courts throughout the Seventh Circuit and other Circuits in the United States. I have engaged in a quite substantial number of appeals in state courts of last resort as well as in the Federal Courts of Appeals of the various Circuits throughout the United States and in the United States Court of Claims and the United States Supreme Court.

I have also appeared before as well as represented state and federal commisisons engaged in both administrative and investigatory matters. Among others, I was senior counsel to the Warren Commission, whose membership was graced by your distinguished late colleagues Honorable Richard B. Russell and Honorable John Sherman Cooper; I served with your distinguished colleagues, Senators Hruska and Hart, as a member of the Presidential Commission to Investigate the Prevention and Causes of Violence in the United States; and in the early 1950's, I was a member of the United States Loyalty Review Board appointed by the distinguished late President Harry S. Truman. I conducted, as a Special Assistant Attorney General of Illinois the investigation of the defalcations of Orville E. Hodge, Auditor of Public Accounts of Illinois.

I mention these bits of history for the purpose only of indicating to you a thoroughly broad and deep experience in litigation and investigation.

Your distinguished colleague, Senator Hruska, mentioned to me that you, Mr. Chairman, and perhaps several of the distinguished members of this Committee had noted the fact that the Judicial Conference Advisory Committee on Federal Rules of Evidence had not included a Newsman's or Journalist's Privilege among those Rules comprising Article V. on Privileges. Senator Hruska, in inviting me to attend a session of this distinguished Committee, suggested that I indicate to the Committee the reason or reasons for that action or non-action on the part of the Advisory Committee.

With your permission, Mr. Chairman, may I say that I appear here solely in my individual capacity. Whatever views I hereafter express in the area of Newsman's Privilege are solely my own, colored, of course, to some extent at least, by my work with the Advisory Committee over the past years.

It would be well for me to indicate to you the basic philosophy of the Advisory Committee respecting the admission and exclusion of evidence. The Committee adhered to the overwhelming rule in this country that, as stated in Rule 402: "all relevant evidence is admissible, *except* as otherwise provided by these rules, by other rules adopted by the Supreme Court, by Act of Congress, or by the Constitution of the United States."

The Committee recognized, however, that evidence, even though relevant, might be excluded because of other compelling considerations consistent with sound and efficient administration of justice, as well as public policy and interest. Therefore, for example, Rule 403 provides that evidence, though relevant, might be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

And also "if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of accumulative evidence."

The Committee adhered to the basic principle that the administration of justice and the public interest are better to be served by bringing to bear in litigated matters in federal courts as well as federal administrative bodies and the Congress of the United States and its distinguished committees all relevant evidence. Therefore, Rule 501 provides that, *except* as required by the Constitution of the United States or an Act of Congress, or as is provided in the evidence rules themselves, no one has the privilege to—

> "(1) refuse to be a witness; or
>
> "(2) refuse to disclose any matter; or
>
> "(3) refuse to produce any object or writing; or
>
> "(4) prevent another from being a witness or disclosing any matter or producing any object or writing."

Rule 501 is the first of the privilege rules set forth in Article V.

Essentially the philosophy of the Committee was that the burden should rest on a party or a witness who seeks to exclude relevant testimony or other relevant evidence to advance a constitutional premise, an Act of the Congress, an exclusionary provision of the proposed Rules of Evidence or some other rule promulgated by the Supreme Court of the United States.

As to the Newsman's or Journalist's Privilege, the Committee's research established that the common law recognized no privilege permitting journalists or gatherers of news for other media to refuse to disclose the names or other identity of persons acting as their source of information. See authorities collected in *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958); *In re Goodfader's Appeal*, 45 Haw. 317, 367 P. 2d 472 (1961); 7 ALR 3rd, 591, 592 (1966) California Law Revision Commission, *Recommendation and Study*, Art. V, Privilege, 481 (1964); *Report on Confidence Laws and Newsman's Privilege*, 17, Massachusetts Legislative Research Bureau (1959).

We noted that neither the American Law Institute Model Code of Evidence of 1949 nor the Uniform Law Commissioners Uniform Rules of Evidence promulgated in 1952 contained a Journalist or Newsman's Privilege.

We also noted that but only some 15 or so states had adopted Journalist Privileg statutes. There are 12 of them cited in 8 Wigmore § 2286, p. 532 (n. 20), McNaughton rev. 1961. See also the other sources to which I have called your attention.

The prototype statute was enacted in Maryland in 1896. No further activity occurred until the New Jersey Act of 1933. Thereafter, Alabama and California adopted statutes in 1935, Arkansas and Kentucky in 1936, Indiana and Ohio in 1941, Montana in 1943 and Michigan in 1949. There have been a few others in recent years.

We also noted that despite mounting campaigns in a number of jurisdictions in recent years, relatively few state statutes had been adopted. See the above Massachusetts Research Bureau's report and the report of the California Law Revision Commission.

We also took note of the fact that although Journalist's Privilege bills had been introduced in the Congress from time to time, none had achieved passage. This circumstance was also noted in the above mentioned Massachusetts and California reports.

Branzburg v. Hayes, 408 U.S. 655 was not decided until June 29, 1972 long after the Advisory Committee and the Standing Committee on Rules of Practice and Procedure had completed their work on the Rules of Evidence and transmitted that work to the United States Judicial Conference. The opinions of the Justices, both the majority and the dissent, contain a wealth of historic data with which you, Mr. Chairman, and your distinguished colleagues are undoubtedly by now eminently familiar.

The fact that the Congress of the United States had not seen fit to promulgate a Journalist's Privilege statute understandably influenced the Advisory Committee. From the very outset of its delibrations, the Advisory Committee was at pains to ascertain and incorporate in the proposed Federal Rules of Evidence all areas in the field of evidence in which the Congress of the United States had adopted legislation and also those areas in which it had not acted favorably on bills and reports in the evidence field.

In addition, and as the Committee's work progressed, it became apparent to us that there was substantial likelihood that the subject matter of a Newsman's or Journalist's Privilege would soon once again be considered by the Congress. The field involved not only constitutional issues, but strong, high level public policy considerations, the resolution of which, we concluded, was far better the province of the Congress than the Advisory Committee.

The initial draft of the proposed rules was published to the bench and bar of the nation in March, 1969. It was widely disseminated. Many thousands of copies were distributed. There was a great wealth of response from the bench and bar during the 14 months the initial draft lay before the country. This great volume of communications to the Committee, consisting of law review articles, seminar discussions, letters, bar association committees, etc., was carefully analyzed by the Advisory Committee and a revised draft was prepared, published and distributed to the bench and bar in March of 1971. During the next six months, we received responses, though, understandably, in a much lesser volume than with respect to the Preliminary Draft. After a six month period, the responses to the draft were analyzed and further revisions made. No suggestions or requests came to the Committee from the bench, the bar or any other source, public or private, for the inclusion of a Journalist's Privilege in the Rules.

For the reasons and considerations which I have now reported to you, the Advisory Committee did not attempt to draft a Newsman's Privilege, but rather, left the matter to the Congress.

The composition of the Advisory Committee may be of some significance to you in this connection. The Committee consisted of 8 nationally known distinguished professional trial lawyers who had had a wealth of litigation experience in civil and criminal cases on both sides of the counsel table, plaintiff and defendant, prosecution and defense, in the state and federal courts throughout the nation; 3 federal Judges, 2 of whom had been well known professional trial lawyers for many years before ascending to the federal bench; 3 nationally known law scholars who had devoted their distinguished academic careers to the field of evidence; and the long time, highly regarded able Chief of the Criminal Appeals Division of the Department of Justice. The Committee's distinguished reporter, Professor Edward W. Cleary, had been a well known trial lawyer in central Illinois for 14 years before joining the faculty of the University of Illinois College of Law in 1946 and thereafter becoming, in the years that followed, a nationally known scholar in the field of evidence. Among many of his published works in the evidence field is the editorship of the recently published latest edition of McCormick on Evidence, the evidence bible of the bench and bar of the United States. Eight of the trial lawyer and judicial members of the Advisory Committee are Fellows of the American College of Trial Lawyers, 3 of them former Presidents of the College.

I turn now, if I may, Mr. Chairman, to the proposed legislation which is before you and your distinguished colleagues. As I said at the outset, I advance only my personal views. I do not speak for or represent the Advisory Committee or any of its members in this regard.

You are faced with two quite compelling and tremendously important, fundamental, far-reaching and competing considerations. On the one hand is freedom of the press, dissemination of information to the public; on the other is the fair administration of justice in which litigants, including the United States, are entitled to relevant evidence. Both are matters of tremendous public concern and interest. Making either of the two considerations absolute, necessarily results in an infringement of the other. Hopefully, there may be some accommodation.

Irrespective of how we as individuals view the opinion of the majority or that of the minority in *Branzburg* v. *Hayes*, the majority opinion stands as the law of the United States on the question of whether the freedom of the press provision of the first amendment affords a news gatherer a constitutional privilege to refuse to disclose the source of his information.

I will not dwell on the many splendid law review articles, textbooks of learned authors, reports of commissions and other study groups, or on the wealth of decided cases. These have all been brought to your attention by the witnesses who have appeared and by your learned counsel.

The courts of this country, from its inception, have with rare exception adhered to the basic doctrine that the "fair administration of justice" requires that all our citizens, regardless of their walks of or functions in life, may be compelled to appear and give evidence relevant to the issues before a court or before a committee of the Congress or other legislative body. This is the basic principle upon which now Justice Stewart relied when holding in *Garland* v. *Torre*, 259 F. 2d 545 (1968), that where the identity of source goes to the heart of a party's claim or defense, the constitution confers no right on the part of a witness to refuse to answer, except, of course, the privilege against self-incrimination. Wigmore, Morgan and McCormick, our greatest evidence scholars, elucidated this doctrine. It is that the public has a right to every man's evidence and it is a public duty that citizens appear and give that evidence. 8 Wigmore § 2192 (McNaughton Rev. 1961); Morgan, Forward, Model Code, pp. 22–30 (1942); *Blair* v. *United States*, 250 U.S. 273; *Anderson* v. *Dunn*, 19 U.S. (6 Wheat) 204 (1821); 36 Va. L.Rev. 75–82; *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); This duty to appear and testify and the right to compel testimony is not absolute, but courts have uniformly been reluctant to find exceptions. They have placed the burden on those who seek to exclude testimony to justify the claimed exception. *United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

In this connection, we should note the provision of Article VI of the United States Constitution that "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

Perhaps I might best proffer my views in this area by responding to the six questions which you pose, Mr. Chairman, in a press release issued Tuesday, January 16, 1973. I will pursue them in the order stated in that release.

1. SHOULD THERE BE LEGISLATION?

Personally, I have come to the conclusion that there should be no legislation. We are soon to celebrate the 200th anniversary of the Constitution of the United States. During all of those years there has been no Newsman's Privilege under federal law. Furthermore, there has been none in the great majority of the states. Even at present, only a handful of states have a Journalist's Privilege statute and these statutes vary in thrust and reach from state to state.

Massachusetts and New York conducted very thorough studies of the subject matter, and the legislators of those states, which considered specific legislation, did not promulgate a Newsman's Privilege. On the other hand, the California legislature did adopt a Journalist's Privilege statute.

In my own state, Illinois, the General Assembly promulgated a Reporter's Privilege statute in 1971 providing that "no court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act," except for libel or slander actions if a reporter or news media is a defendant. There follows procedure for applications to the Court for divestiture of the privilege if claimed; the application must state among other things "a specific public interest which would be adversely affected if the factual information sought were not disclosed" as well as "adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove."[1]

The great investigating newspapers of the nation have rendered tremendous public service in exposing crime and corruption, public and private, in the absence of a Newsman's Privilege shield. I have in mind the *New York Times*, the *Washington Post*, the *Christian Science Monitor*, the *Atlanta Constitution* and *Journal*, the *St. Louis Post Dispatch*, the *Los Angeles Times* and in my own state the *Chicago Tribune*, the *Chicago Sun Times* and the *Chicago Daily News*. These are but examples. There are a number of others.

I am of the school of thought that a very heavy burden lies upon those who seek to exclude evidence.

I am also of the view that the courts, especially the federal courts, have been and will continue to be very wary of compelling newsmen to reveal their sources. For example, I call your attention to the recent unanimous decision of the Court of Appeals of the Second Circuit in *Clark* v. *Universal Builders*, F 2d , now pending before the United States Supreme Court as *Baker* v. *F & F Investment* on application for certiorari. In that case, the court affirmed the decision of Federal District Judge Bonsel in refusing to compel a journalist to reveal his source of information in a civil suit under the Civil Rights Act, in which a class of approxmiately 3,000 black citizens who had purchased homes in Chicago sought the source upon which the journalist relied in reporting actual "blockbusting" in the city of Chicago. The verdict of the Court of Appeals was that there was "insufficient compelling interest" on the part of the plaintiffs in seeking the source of information as against the strong public policy expressed in the freedom of press provision of the First Amendment.

I am also led to this view by the fact that legislation in this area poses serious difficulties, the least of which is the statutory definition of a journalist.

2. SHOULD THE PRIVILEGE BE ABSOLUTE OR QUALIFIED?

In my judgment, the privilege, if the Congress in its wisdom determines to enact a statute, should be qualified. By promulgating a qualified privilege, there will be an accommodation of the strong, competing interests to which I have alluded, and of which you, Mr. Chairman, and your distinguished colleagues, are very much aware. A qualified privilege will also bring the federal judges into play and afford them an opportunity to administer justice by accommodating the conflicting public interests.

3. SHOULD THE PRIVILEGE APPLY TO FEDERAL PROCEEDINGS ONLY, OR SHOULD STATE PROCEEDINGS BE INCLUDED?

I am mindful, Mr. Chairman, that recently, if the article I read in the press is accurate, you stated that you had come to the conclusion that the privilege, if provided by statute, should embrace state proceedings as well as federal proceedings. I respectively suggest to you, sir, that your initial viewpoint on this subject matter was the sounder one. The considerations involved are ones of abiding concern to the people of each of the sovereign states. A minority of the states have adopted privilege statutes and, even in that respect, largely in recent years. A good many of the state legislatures have declined to adopt Newsman's Privilege statutes after thorough study and consideration of the matter. Federal pre-emption is a serious matter as respects the states. The courts of highest resort of the states who have had the matter under consideration have held there is no constitutional privilege. I respectfully suggest that the Congress should not impose its views on this important public interest issue upon the states.

---

[1] Ill. Rev. Stat. Vol. 2, ch. 51, §§ 111–116 (1971).

I respectfully call your attention to the fact that the National Conference of Commissioners on Uniform State Laws is now engaged in drafting a Uniform Newsman's Privilege Act which will be considered at the forthcoming Annual Meeting of the Conference to be held in August of this year. Thus will be brought to bear the judgments and considerations of the 225 Commissioners who represent the 50 states, the District of Columbia and the Commonwealth of Puerto Rico.

4. WHO SHOULD BE ENTITLED TO CLAIM THE PRIVILEGE?

If there is to be a Newsman's Privilege, then, as a practical matter, I suppose it must be afforded to the journalists. However, my I respectfully suggest the possibility that the journalist not be permitted to assert the privilege until and unless he has consulted his source to elicit from that source a decision whether the privilege be asserted or waived by the newsman. It will be said, I am sure, that this is an unnecessary complication and probably an impractical procedure. I would concede that in most instances the source, if still ascertainable and subject to contact, would decline to waive the privilege, but I am sure there will be some waivers.

5. IF SOME QUALIFIED PRIVILEGE IS DESIRABLE, WHAT SHOULD BE THE QUALIFICATIONS?

I recommend consideration of Newsman's Privilege statute of the character in force in Illinois, under which a compelling public interest must be established to require disclosure and it must appear that the source goes to the heart of the plaintiff's or prosecution's claim or the defendant's defense. Under the Illinois statute, there must be a showing that the information is not obtainable by other means. This particular principle is enunciated by the Court of Appeals in the Second Circuit in the *Clark* case, now pending (as *Bak* v. *F.&F. Investment*) on application for certiorari to the United States Supreme Court.

However, the privilege should not be sustainable if the source of information is needed in the interest of national security.

In my judgment, if the source is sought in a criminal case and the defendant seeks discovery of the source and it appears that the discovery will assist and strengthen his defense, then strong policy considerations exist against allowing a newsman to decline to reveal that source. In this connection, I commend to your attention the United States Supreme Court opinion in *Roviaro* v. *United States*, 353 U.S. 53 (1957), dealing with disclosure of the identity of informers. I suppose I am saying that in criminal cases, the Newsman's Privilege should be recognized only in the most compelling of circumstances. On the other hand, I would recognize that there are often compelling civil cases. In addition, there is the interest of the Congress of the United States or any other legislative body in obtaining relevant testimony, assuming that relevant testimony be the source of information.

I rather cotton to the proposed New York Act, which failed of passage in 1949, which would have compelled disclosure of source where "essential to the protection of the public interest." We might turn to the informer analogy where public policy forbids disclosure of an informer identity unless essential to the defense. *Shur* v. *United States*, 305 U.S. 251, 254 (1938).

Another factor to be considered is that source identity should not be disclosed when revelation of the information alone would suffice.

I am not unmindful that the so-called "necessity of litigation" test may result in some erosion of free flow of information but, on the other hand, the granting of absolute privilege will seriously erode the right of the public to the fair administration of justice.

Of course, it goes without saying that the Newsman's Privilege, if there be one, should not be permitted where it appears that the newsman is using the information regardless of its source for illegal purposes.

5. WHAT SHOULD BE THE PROCEDURAL MECHANISMS THROUGH WHICH THE PRIVILEGE IS GRANTED?

I hope I am not guilty of oversimplification, but I wish to observe in this connection that existing civil and criminal procedures, especially those that obtain in the federal courts under the rules of criminal and civil procedure, afford quite sufficient procedural means for the assertion of the privilege on the one hand and the application on the other hand of the opposite party that the court not sustain the privilege, along the lines of the Illinois statute for example. I have not detected in any of the decided cases any problem with respect to procedural means. Ill. Rev. Stat. Vol. 2, ch. 51, §§ 111–116 (1971).

STATEMENT OF THE AUTHORS LEAGUE OF AMERICA

Mr. Chairman and Members of the Subcommittee, my name is Irwin Karp. I am attorney for The Authors League of America a national society of authors of books, magazine articles and plays. I appreciate this opportunity to present our views on proposed legislation to protect writers and publishers against the compulsory disclosure of sources of information, and unpublished information gathered in the course of their work.

Summary of the League's Statement

1. Compulsory disclosure of sources and information chokes off the flow of information. Protection against compulsory disclosure is essential to protect the newsgathering process, freedom of the press and the public's right to be informed.

2. Statutory safeguards are required. The Press cannot "rely" on judicial interpretations of the first amendment since the Supreme Court has ruled in *Caldwell* it does not prevent compulsory disclosure as a matter of general application.

3. Statutory protection against compulsory disclosure must apply to authors of books, whose contributions to investigative reporting easily stand comparison to other media, and who must rely heavily on the promise of confidentiality to sources.

4. The statutory safeguards should apply to state as well as federal action. Congress has the authority to act under the first and fourteenth amendments, and under the Commerce Clause.

5. The protection against compulsory disclosure should be unqualified. Exceptions are unnecessary, self-defeating and counter-productive.

6. If Congress opts for a qualified approach, it should adopt S. 637, introduced by Senator Mondale. Its narrow exceptions and careful procedural safeguards are essential. It would give protection at least as effective as the Supreme Court would have granted had the *Caldwell* decision gone the other way.

7. Attachment: Memorandum of Law to Subcommittee No. 3.

The Need for Protection Against Compulsory Disclosure

Mr. Justice Stewart's opinion in the *Branzburg, Pappas* and *Caldwell* cases demonstrates that compulsory disclosure chokes off information the public is entitled to receive. People who possess such information will not give it to a reporter or writer for fear that a subpoena will compel him to disclose their identities or material given on a confidential basis. As Justice Stewart said, the deterrent effects were "impressively developed in the District Court in *Caldwell*. Individual reporters and commentators have noted such effects." Testimony before this Committee and Subcommittee No. 3 of the House Judiciary Committee also support this conclusion. Moreover, as Justice Stewart's opinion explains, compulsory disclosure will deter many writers from seeking or publishing controverisal information. This is now the only way they can avoid the impossible dilemma of betraying their confidential sources or going to jail. The result is the most insidious form of censorship—self-censorship. Compulsory disclosure also allows government to convert a writer "after the fact into an investigative agent of the Government . . . imposing a governmental function upon (him) . . . ." This violates "the very concept of a free press."

Some advocates of compulsory disclosure contend that journalists and writers are "no different" from other prospective witnesses and must have the same "duty" to testify. This argument ignores the realities of investigative reporting, and the *public's* need to protect the confidentiality of a reporter's sources. Most prospective witnesses acquire information by chance. Events occur in their presence; they receive information in business, social or casual relationships. The fact that some people must disclose information as witnesses does not stop the flow of events by which it comes to most of us. Journalists and writers, on the other hand, deliberately seek out information as the first step in the process of informing the public. As the Court of Appeals noted in *Caldwell*, they perform a "public function" as "news gatherers." And unlike ordinary witnesses, the threat of compulsory disclosure does prevent them from obtaining information. Sources will not provide it; many journalists will stop seeking it in controversial situations.

Protection against compulsory disclosure is not sought as a personal privilege for individual writers. It is needed to protect the newsgathering process, to preserve the public's right to be informed. First amendment rights are established "not for the benefit of the press so much as for the benefit of all of us." (*Time, Inc.* v. *Hill*, 385 U.S. 374, 389).

Some advocates of compulsory disclosure suggest it is "improper" for the press to rely on confidential sources or information. This is simply an oblique way of suggesting that authors and journalists should stop writing about official corruption, malfeasance, social problems and other evils. Without confidential sources and materials, the press—like Congressmen and public officials—could not discover or expose many of these problems. Many people in and out of government will not risk their safety or jobs by openly disclosing vital information. Many fear to become involved with government officials; they will not volunteer this information to grand juries or legislative committees. In the past, many would only give it to journalists and writers—on a confidential basis. If Congress does not remedy the damage done by *Caldwell*, this valuable and indispensible source of information will be destroyed. The public, not writers, will be the loser.

Statutory Safeguards are Required

Some opponents of compulsory disclosure argue it is "dangerous" to enact legislative safeguards. They say it is better to "rely" on the first amendment. This is a baffling and empty argument—the Caldwell opinion has destroyed that alternative. A majority of the Supreme Court has refused to apply the First Amendment to protect the press against compulsory disclosure. Unless the Congress acts, the press will have no protection against compulsion by federal authorities, and none against the majority of states which do not have shield laws.

In the foreseeable future the Court is not likely to change its ruling. More important, as is indicated below, even if the Court were to suddenly shift and adopt the minority opinion of Justices Stewart. Brennan and Marshall, the Court would give no greater protection than is provided in S. 637. Thus if Congress does not act, the press will have no protection against compulsory disclosure for years to come—except the "power" of going to jail to protect sources. And that is not enough to reassure many potential informants who are realistic enough to know that not all writers will embrace temporary martyrdom.

It is pointless to reject Congressional safeguards in the name of the first amendment. If the Court someday ruled in a new interpretation that the first amendment granted absolute protection against compulsory disclosure, any lesser protection granted by Congress would be superseded by the broader safeguards of the Court's new ruling. Freedom of the press must suffer if Congress does not fill the gap left by *Caldwell*. It gains much if Congress enacts S. 637 or comparable legislation; it gains even more if unqualified protection is legislated.

The Proposed Legislation Should Protect Authors of Books

Protection against compulsory disclosure is as essential for authors of books and magazines as it is for newspaper, television and radio writers and commentators. From Ida Tarbell's *History of the Standard Oil Company* to Seymour Hersh's *My Lai 4*, Rachel Carsons's *Silent Spring*, Ralph Nader's *Unsafe at Any Speed* and Alfred W. McCoy's *The Politics of Heroin in Southeast Asia*, much of the most valuable "investigative reporting" has been done in books on current social, political and economic problems. Books have spurred Congress to act on automobile safety, preservation of the environment, consumer protection and other major issues. Books have often blazed the trail for newspapers and television. Indeed if one weighed the contributions of investigative reporting in books and on televison, the scales would register a more valuable contribution by book authors.

Writers of such books must have protection against compulsory disclosure. As they have frequently indicated, much of their information can only be acquired on condition that they protect the confidentiality of their sources. For example: Michael Dorman, former reporter for the *New York Post*, *New York News*, *Newsweek* and *Newsday*, in 1972 published a book of investigative reporting entitled *The Role of Organized Crime in American Politics*. In the preface, he said: some informants "provided me with the information I needed on the promise they would not be identified . . . the promises of confidentiality I made were identical with those I made to Presidents and former Presidents of the United States. To a writer, protection of sources is essential . . . ." In the 1972 book by Mark Green, Beverly Moore and Bruce Wasserstrom entitled *The Closed Enterprise System*—the Ralph Nader study group report on antitrust law enforcement—the preface says: "Finally we must acknowledge the valuable cooperation of many interviewees who requested anonymity, a condition carefully observed." Similar testimony on the need to preserve confidentiality is found in the prefaces of such books as: *110 Livingston Street*, by David Rogers (Random House, 1968), a landmark study which influenced the restructuring of the New York City School system; *My Lai 4*, by Seymour Harsh (Random House, 1970); *Pawns, the Plight of the Citizen Soldier*, by Peter Barnes (Knopf, 1972); *Inside Internal Revenue*, by William Surface (Coward McCann, 1967); *Five Families*, Oscar Lewis.

S. 637, introduced by Senator Mondale, would give authors of such books the same protection against compulsory disclosure that newspaper, radio or television writers would have. Determining if someone is an "author" within the meaning of the statute raises no greater problem than deciding if someone qualifies as a "reporter" under the proposed legislation or existing state shield laws. Not every self-proclaimed "journalist" is automatically granted protection; whether he really is one is a question of fact for a Court to decide.

The court also can decide if a subpoenaed individual is, in fact, an author who acquired the information sought while preparing a book or magazine article for publication. His previously published works would be relevant to his status. So, too, would be a contract with a recognized publisher to publish the book for which the information was gathered. Indeed the issue of qualification ordinarily will be easy to resolve, since it will usually arise *after* the book has been published, or when it is in printed galley form (in the pubisher's hands). Authors have been subpoenaed to disclose information they acquired while preparing books. If the license granted by *Caldwell* is not terminated by Congress, the practice will grow. Authors are excellent investigators; it is tempting for grand juries and committees to draft them by subpoena as unwilling agents and informers.

Congressional Safeguards Should Apply to the States

The Authors League urges that Congress enact safeguards against compulsory disclosure that will apply to state as well as federal action. Protecting a reporter or writer against compulsory disclosure to a federal grand jury will not induce potential informants to confide in him if a state grand jury or legislative committee can compel him to disclose his sources of information. And protection by state shield laws will not protect confidential sources against exposure by federal grand juries or committees. Moreover, the gathering and dissemination of news and information are interstate activities which serve a national audience. State action which compels disclosure of sources or information chokes off information which people in other states are entitled to have.

In a memorandum to Subcommittee No. 3 of the House Judiciary Committee, we set forth the authorities which we believe support our view that Congress has the power to enact safeguards which apply to the states. A copy of the memorandum is attached to this statement. As there indicated, Congress has the power to act under the Commerce Clause. It also has the power to prevent compulsory disclosure by states, under the First and Fourteenth Amendments.

Congress Should Establish Unqualified Safeguards

The protection against compulsory disclosure should not be curtailed by exceptions. Any information gathered by a journalist or author in the course of his work should be protected; and he should not be compelled to dislose any of his sources. Exceptions to this protection will deter informants from speaking out to writers. Potential sources are not going to stake their personal safety or job security on the vagaries and niceties of judicial interpretation.

Opponents of absolute protection argue that certain exceptions are required because some information is too important for journalists to withhold; for example, the identity of a murderer or spy. But the basic value judgment of the first amendment answers that argument. Effective freedom of speech and press cause abuses and injury. But exceptions designed to prevent these cause far greater damage—to these first amendment freedoms. To preserve these rights, it is better to refuse exceptions and tolerate the abuses. To protect the free flow of information, it is better to reject exceptions and occasionally lose the evidence a reporter might be compelled to disclose under subpoena. In reality, the sacrifice is minimal. Writers can rarely provide admissable evidence which establishes the guilt of murderers, spies or other criminals. And exceptions would be self-defeating. As the practice of compelling reporters to testify increases, criminals and underworld sources will stop confiding information to them. Grand juries may subpoena, but the reporter's usefulness as an unwilling government agent will soon wear out.

However, the public will pay a heavy price for these self defeating exceptions. As Mr. Justice Stewart noted, such information given to writers on a confidential basis comes not from wrongdoers, but from people who want to expose wrongdoing. Disclosures of corruption, malfeasance and dishonesty, in and outside of government, often stem from information provided the press by employees who insist on confidentiality for fear of losing their jobs or ruining their careers. Exceptions which make disclosure possible will frighten these people into silence. This will prevent the press—newspapers, books, magazines, radio and television—from continuing to perform their historic role as an instrument of inquiry, probing and reporting to the public on social problems, political chicanery and criminal activities which grand juries and other official agencies are so often unwilling or unable to expose.

Finally, the experience of several states which have enacted absolute shield laws does not confirm the fears that complete protection for the press would seriously hamper law enforcement.

If Congress Opts for Qualified Protection The Senate Should Enact S. 637

The Authors League believes the most effective protection for the free flow of information is the absolute prohibition of compulsory disclosure of sources and information. It is practical. It can work. However, if Congress will not adopt this approach, we urge that the Senate enact S. 637 introduced by Senators Mondale, Mansfield, Proxmire, McGovern, Humphrey, Pell, Burdick, Williams and Haskell.

Some of our colleagues seem to think that if an absolute statutory safeguard is not adopted, Congress should not act at all. This is pointless. Some who hold this view apparently assume the press would have received absolute protection if the *Caldwell* (et al.) decision had gone the other way; and they would prefer to wait for the Court to come around to the minority point of view. However, if the Court had adopted the minority opinion of Justices Stewart, Brennan and Marshall, the press would have received qualified protection under the First Amendment—somewhat less effective protection than is provided in S. 637. Justice Stewart said the government could compel a reporter to testify when it could—

> "(1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law;
>
> "(2) demonstrate that the information sought cannot be obtained by alternative means less destructive of first amendment rights; and
>
> "(3) demonsrate a compelling and overriding interest in the information."

Thus, enactment of S. 637 would preserve the free flow of information as effectively as if *Caldwell* had gone the other way. And it provides vastly more effective protection against compulsory disclosure than "relying on the first amendment"—since the Court has refused to apply the amendment to prevent disclosure. Moreover, as we have noted above, S. 637 or similar legislation would not preclude the Supreme Court from ruling that the first amendment does grant absolute protection to the press, a ruling which would supersede any statute that gave a lesser degree of protection. For the reasons set out in the attached memorandum, we submit that while Congress cannot diminish the scope of first amendment freedoms, as interpreted by the Court, it can give them a more effective degree of protection than the Court is prepared to allow at a given time.

We believe that if limits are to be placed on the protection against compulsory disclosure, they must be narrowly drawn, and subject to careful procedural safeguards. Otherwise, "protection would indeed be illusory and meaningless. At the outset, the burden of proving that protection should be set aside must rest on the government agency trying to set it aside; and it must prove that the conditions for removal exist, by clear and convincing evidence, in a hearing at which the writer or journalist may defend his right to confidentiality. S. 637 provides these safeguards.

The government should be required to prove that there is probable cause to believe that the writer has information which is clearly relevant to specific probable violations of law, in limited categories of offenses. As Justice Stewart emphasized, the broad investigative powers of grand juries and other bodies (including legislative committees) and their weak standards of relevance and materiality make this condition imperative. Without it, reporters and writers could be compelled to disclose information having no connecton or relevance to violations of law within the jurisdiction of the grand jury or other body (which must have such jurisdiction). S. 637 imposes these requirements.

It also requires that such probable violation of law must involve an imminent danger of foreign aggression, espionage or threat to human life which cannot be prevented without the disclosure. This limits the areas of information in which disclosure can be compelled, reducing the deterrent effect on potential informants. By contrast, exceptions which required a reported to disclose any information of which he had personal knowledge, or any admission of a crime made to him, would open the door so wide, that the flow of information would inevitably be choked off. Nor should any loose exception be allowed in libel suits. As the Court of Appeals emphasized in *Cervantes* v. *Time, Inc. and Walsh*, 464 F. 2d 985 (8th Cir. 1972) the compulsory disclosure of confidential sources in a libel suit may constitute the very form of harrassment of the press which Mr. Justice Powell stated, in *Caldwell*, was barred by the first amendment (p. 995). Moreover, the Court ruled that compulsory disclosure was not necessary to enable the plaintiff to prove knowing falsity or reckless disregard of the truth. It should also be remembered that civil libel suits and their pre-trial examinations can be, and have been, employed for the primary purpose of forcing the disclosure of confidential informants whose information is embarrassing to a powerful plaintiff. The *Cervantes* opinion indicates that other methods can deal with the problems of proof under the *New York Times* rule, and that libel suits should not be allowed to serve as a weapon for compelling disclosure of sources or information.

The third condition prescribed in S. 637 is also essential—the government must also prove, by clear and convincing evidence, that the information cannot be obtained by alternative means. As Mr. Justice Stewart emphasized, it would be a futile sacrifice of freedom of communication if a grand jury or legislative committee or other arm of government could compel a writer to disclose sources or information, when the same information could be obtained by other means. This is particularly so in the case of grand juries and legislative committees which are not bound by tight rules of evidence, and have other sources for such information.

We believe it is essential that all of the conditions of S. 637 be incorporated in a safeguard statute; in combination, they can limit the chilling effect of a qualified privilege on the free flow of information. We also believe it is imperative that the protection of the statute apply to all information gathered, received or prepared by media of communication which has not been published, and to sources of such information—as S. 637 provides. Attempts to qualify the types of information protected by such subjective tests as "confidentiality" would vitiate the protection.

Finally, we urge that whether Congress adopt an absolute safeguard or S. 637, the protection of the statute should apply to authors of books. Without such protection, much valuable investigative writing and reporting would be severely handicapped; and the public would lose the benefit of the thorough and independent investigation of vital and controversial social problems which authors of books have conducted.

* * *

THE AUTHORS LEAGUE OF AMERICA, INC.,
January 11, 1973.

To: Hon. Robert W. Kastenmeier, Chairman, Subcommittee No. 3, Committee on the Judiciary
From: Irwin Karp, Esq.
Re: Authority of Congress to Enact Free-Flow of Information Legislation Preventing States from Compelling Disclosure of Confidential Sources or Information

1. The Authors League and other organizations have urged the Subcommittee to report to the Congress legislation which would protect journalists and authors against compusion by Federal or State authorities to disclose confidential sources or unpublished information.

The question has been raised: does Congress have the authority to adopt free-flow of information legislation which would apply to state action.

2. We respectfully submit that Congress has the Constitutional power to enact legislation protecting writers and publishers against state compulsion to disclose confidential sources or information and against punitive action by the states for refusal to make such disclosures. We believe Congress has the authority to grant such protection under the Commerce Clause of the Constitution; and that it also has the power under the first and fourteenth amendments. Authorities for this view are discussed below.

3. This memorandum is addressed only to the question of Congressional authority to legislate protection against state action in this area. The reasons why Congress should enact such protection are the same as those which require that Congress establish safeguards against compulsory disclosure by Federal authorities. These are discussed in our statement and testimony to the Committee on September 27, 1972. The gathering and dissemination of news and information are interstate activities, and serve a national audience. Compulsory disclosure, by state authority, will dry up sources of information on matters of national interest, prevent the gathering of information for news stories, articles and books which are distributed in interstate commerce and deny citizens throughout the nation the right to be informed about events that concern them.

THE COMMERCE CLAUSE

As the Supreme Court has emphasized, "the power of Congress over the instrumentalities of interstate commerce is plenary. Congress can prohibit conduct which would be lawful under state law. (*Cleveland* v. *U.S.*, 329 U.S. 14, 19).

And Congress can prevent the states from punishing conduct which they have the constitutional authority to make illegal. In *Railway Employee Department* v. *Hanson*, 351 U.S. 225, the Court rules that states had the authority to adopt right to work laws and to make the union shop illegal. However, the Court held, the states could not enforce these laws against employees subject to the Railway Labor Act. The Court noted that in the exercise of its power to protect interstate commerce under Article I, Section 8, the Congress could authorize and protect conduct which states had prohibited by otherwise valid legislation.

In *Reina* v. *United States*, 364 U.S. 507, the Court held that Congress had the authority under the Commerce Clause to grant immunity from state prosecution, under state narcotics statutes. In *Reina*, the Petitioner argued that the Commerce Clause did not give Congress the power to prevent state prosecutions. The Court rejected this argument, saying:

"Congress may legislate immunity restricting the exercise of state power to the extent necessary and proper for the more effective exercise of a granted power, and disinctions based upon the particular granted power concerned have no support in the Constitution. See *Brown* v. *Walker*, 161 U.S. 591, in which the Court upheld a federal immunity statute passed in the name of the Commerce Clause and construed that statute to apply to state prosecutions." (364 U.S. at 511)

We submit that the Commerce Clause gives Congress the same authority to grant writers and publishers immunity against state prosecution or punishment for refusing to disclose confidential sources or information, in order to protect the activities in interstate commerce of gathering and disseminating news and information.

In *Associated Press* v. *Labor Board*, 301 U.S. 103, the Court held that the gathering and dissemination of news are activities in interstate commerce and "involve the constant use of channels of Interstate and Foreign commerce" and that the Congress can adopt appropriate statutes "for the protection and advancement, and for the insurance of the safety of, such commerce." For the reasons indicated above (Par. 3) compulsory disclosure of confidential sources and information would restrict the essential interstate activities of gathering and disseminating news and information.

THE FIRST AND FOURTEENTH AMENDMENTS

In *Branzburg* v. *Hayes*, both the majority and minority opinions agreed that news gathering was protected by the first amendment (see Slip Op. p. 15). The opinions parted company on the issue of whether compulsory disclosure violated that protection. In *Edwards* v. *South Carolina*, 372 U.S. 229, the Court emphasized, as it had many times before (see p. 235): "It has long been established that these first amendment freedoms are protected by the fourteenth from invasion by the states."

Section 5 of the fourteenth amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." As the Supreme Court pointed out in *Katzenbach* v. *Morgan*, 384 U.S. 641, Section 5 gave Congress power to do more than merely "abrogate (e) only those state laws that the judicial branch was prepared to adjudge unconstitutional" (p. 649). And the Court pointed out that Congress could prohibit state conduct which the Supreme Court might not declare a violation of the fourteenth amendment, if such legislation was appropriate to carry out the provisions of the amendment. Here, we submit, there is ample evidence to justify the conclusion by Congress that compulsory disclosure by state authorities will lead in many instances to invasions of first and fourteenth amendment freedoms to gather and publish information, even though disclosure *per se* may not be a violation; and therefore Congress may, under the fourteenth amendment apply prohibitions against compulsory disclosure to the states.

Moreover, 5 Justices—Justice Powell and the four dissenters—agree that there will be circumstances in which compulsory disclosure would infringe "legitimate first amendment interests (which, require protection". (Justice Powell, Slip Op. pp. 2–3). Therefore, to protect these legitimate first amendment interests, recognized by a *majority* of the Court, the Congress may, in the exercise of its power under the fourteenth amendment, prohibit all compulsory disclosure by the states.

We submit that while Congress could take no action to diminish first amendment freedoms, it has the power to give them a greater and more effective degree of protection than the Court may be prepared to allow at any given time; a power granted by Sec. 5 of the fourteenth amendment.

And the Court has recognized that the Congress may act affirmatively to implement first amendment freedoms. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, the Court said that because the regulations in question were authorized by Congress and because they "enhance rather than abridge the freedoms of speech and press protected by the first amendment, we hold them valid and constitutional . . ." (p. 375). See also, *Rowan* v. *Post Office* 397 U.S. 728 where the Court ruled that Congress had the power to protect "the very basic right to be free from sights, sounds and tangible matter we do not want . . ."—a right which some Justices believe secured by the first amendment, and other by various provisions of the Bill of Rights.

We respectfully submit that the Free-Flow of Information Act passed by the Congress could prohibit compulsory disclosure by the states as well as the Federal Government; and that such a prohibition could specifically recognize the right of states to give an even greater degree of protection against compulsory disclosure than that granted by Congress, if Congress does not give complete protection.

STATEMENT OF HON. EDWARD I. KOCH, A REPRESENTATIVE IN CONGRESS FROM THE 18TH DISTRICT FOR THE STATE OF NEW YORK

Mr. Chairman and members of the committee, I appreciate the opportunity of testifying with respect to the bill I have cosponsored, H.R. 1263, and the overriding need that I believe exists for its passage.

In January 1971, I introduced H.R. 837 because of my conclusion that it would be well to clarify the bounds of the rights of journalists to protect their confidential sources and information. Over two years have passed and, I regret to say, what is now needed is not clarification but vindication of the core first amendment values at stake.

Since I introduced H.R. 837, the Supreme Court, in its 5–4 ruling in the *Caldwell* case, significantly limited the ability of the press to gather information and thus of the public to receive information. The *Caldwell* ruling itself followed a period in which a large amount of subpoenas were served upon the media—over 120 upon two networks alone in a time period of less than two years. *Caldwell* has been followed by the jailing of some newsmen and the threat of jailing to all who believe they must protect the source and nature of confidential information obtained by them. All this has occurred under an Administration whose public and private attitude toward the press has vacillated between simple distaste and venomous distrust. It is already past time, I believe, for congressional action to insure that the channels of communication of information to the public are not damned.

The bill I introduced three years ago was a "qualified" one and the bill I am now cosponsoring, H.R. 1263, is an "absolute" one. The reason for my change is the change around us: an Administration seemingly committed to preventing the press fron performing its first amendment functions (as well demonstrated in the Pentagon Papers case); and courts which are unwilling to read qualified bills as if *any* protection were intended and which seem unwilling to read even supposedly "absolute" bills as if any protection had been given. This Administration's conduct in the Pentagon Papers case is itself an object lesson that qualifications in "newsmen's privilege" legislation relating to "national security" opens a Pandora's Box which may then be impossible to close.

As for the courts, two decisions in my native state of New York rendered last Friday (February 23) are illustrative. In one, the Appellate Division upheld the ordering of reporters who visited Attica Prison—as reporters—to testify as to what they saw while serving in the reportorial capacity. This was ordered despite the fact that police would not have been permitted to enter by the prisoners and that once reporters are thought of as ad hoc police agents, such stories will be subsequent unavailable to the public. It was also ordered despite the fact that we have in New York what is thought of as an "absolute" privilege statute. This demonstrates the need for the Congress in passing a bill to clarify our intent that the "privilege" be interpreted in its broadest terms. There must be no mistake about our intent that a reporter will not be forced to testify against his will on an event he witnessed in the course of gathering information for a story, to turn over unpublished working notes, nor to reveal confidential sources of information.

In the other case, a magazine was forced to give up its reportorial work-product, its drafts of manuscripts of a later published article with respect to what is now the trial of H. Rap Brown for armed robbery. In this case it was the defense that requested the information. My own feeling is that the principle of newsmen's privilege must be respected in cases in which the defense is seeking the disclosure of confidential information, as well as the prosecution.

I appreciate the fact that in both these cases the argument can be made that the public should be told everything the reporters saw and knew, both about Attica and the holdup allegedly committed by Brown. But to require reporters so to testify is necessarily and inevitably to impede their ability to gather news in *all* cases—and hence that of the public to receive it.

In other cases, qualified statutes have been read so narrowly that former journalists such as William Farr have been held not entitled to their protection and journalist Peter Bridge of a defunct newspaper, similarly held unprotected. These are more illustrations of the manner in which the courts have interpreted the statutes now in existence at the state level.

The number of subpoenas ordering newsmen to disclose confidential information has increased at an alarming rate in the past year making all the more urgent the need for congressional action. Just this week a publisher, editor and 10 reporters were ordered to turn over to President Nixon's re-election committee all their notes, tapes and other private material relating to news articles on the bugging of the Democratic National Committee headquarters in June. The argument by the Republicans' lawyer that his client is not asking for "confidential sources" but rather "information they secured in interviews," is specious. The confidentiality of working notes is equally important as the names of confidential sources. Furthermore, if the subpoenas are broad enough, covering both private and public conversations, they will effectively lead to the identification of the sources.

In closing I should note that I am joining in introducing Congressman Waldie's bill, H.R. 2187, to extend the privilege to the state level. The language of the bill is also tighter in expressing the intent of Congress that the law when passed be broadly interpreted. The bill states that:

"No person shall be required to disclose in any Federal or State proceeding—

"(1) the source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public, or

"(2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public."

H.R. 2187 avoids any possible disqualification if the person is a "former reporter" or the publication was a defunct one. It also avoids a narrow interpretation of "newsman" or "confidentiality" to which some of the earlier bills and state statutes have been subjected.

It is time to extend a broad, encompassing protection to newsmen. This is not for their private or personal benefit. It is a protection for all of us. I believe—and I believe it is the essence of the first amendment—that the Nation would do better to protect reporters than to protect those who would save us from them.

STATEMENT BY ELMER W. LOWER, PRESIDENT, ABC NEWS, FEBRUARY 1973

ABC urges this Congress to enact a newsmen's privilege bill to provide that newsmen and news media may not be compelled in any federal or state judicial, legislative, executive or administrative proceeding to disclose any unpublished information or the source of any information, published or unpublished, gathered in the course of investigating, preparing and reporting the news. The privilege should extend to notes, photographs, film, tapes and information in any form which the newsman or news medium has not voluntarily made public.

Last October, ABC submitted a statement to House Judiciary Subcommittee No. 3 supporting enactment of a qualified newsmen's privilege bill in the belief that qualified privilege would suffice to accomplish the goal of protecting the free flow of information to the public. In light of developments since that time, we have now come to the view that absolute privilege is required to accomplish this end, and we advocate a preemptive statute which would express the sense of Congress that preserving first amendment values warrants national priority

The news media have faced threats to freedom of the press in the past, and have withstood those attacks without recourse to national legislation. We have been sustained by powerful first amendment traditions, supported by Supreme Court decisions which have recognized that our democratic system depends upon free and open channels of communication. The *Caldwell* decision changed that, and what has ensued since *Caldwell* has turned threat into reality.

Sources are beginning to dry up and reporters are censoring themselves. From the field, journalists report that once-cooperative confidential sources, aware of the *Caldwell* decision, are backing off for fear of exposure. There is little dispute that journalists rely heavily on confidential sources. Often, sources risk their jobs, their status, perhaps even their lives, if their identity is revealed. Increase the risk to confidential sources and you decrease the number of sources.

Incidentally, newsmen as a group have no predilection for martyrdom. Like most Americans, newsmen want to do their jobs and be left alone. This observation lends credence to disturbing reports I have read recently that journalists are avoiding being present during activities the government might want to investigate. Other newsmen report that they have destroyed background notes and tapes they might have used in future stories. This may not be censorship as strictly defined, but the result is identical. The public is denied information it would otherwise have.

It is essential that we remind ourselves that the information the press digs up which causes controversy is not trivial fan magazine gossip about celebrities' private lives. It is the much less glamorous but much more significant information about corruption, waste and inefficiency in government, and in unions, corporations, charities and other institutions that wield influence over our lives.

It is equally essential to reiterate that we in the news profession do not fancy ourselves a privileged class entitled to immunity as a matter of personal right. We view newsmen's privilege as necessary to the effective exercise of our responsibility to the public. The public responsibility of the press was built into our system by the Founding Fathers as a safeguard against the abuse of government authority. That responsibility has grown as our country and government have expanded and the individual's sphere of personal information has diminished.

Since *Caldwell*, that responsibility has become hazardous. The number of subpoenas for reporters' testimony has increased, primarily on state and local levels. State judges in construing state "shield" statutes have placed extraordinarily narrow interpretations on the privilege and ruled it not applicable in important cases.

In retrospect, what has occurred since *Caldwell* is not surprising. If a newsman breaks a story about misdeeds in government, he is the most convenient short-cut to more information. Rather than conduct its own investigation, which takes time, money and plain hard work, the authorities demand that the newsman turn over his work product. What is most disturbing is the instance where the newsman's information is sought not to identify the wrongdoer but to identify the source that caused embarrassment to the government. The practical fact is that the government doesn't need the newsman's information for successful prosecution. No newsman or news organization can match the panoply of power and resources the government can bring to bear on an investigation when it wants to.

It is also not surprising that state judges have tended to find loopholes in state "shield" laws. The judge is duty-bound to summon all pertinent witnesses and available data. He is bound to be harsh in evaluating any privilege which appears to interfere with that process. His perspective is necessarily short-term—resolving the case at hand. He does not generally give appropriate consideration to the larger, societal questions raised by compelling disclosure. That is a job Congress must do.

The climate of pressure on newsmen since *Caldwell* threatens to affect our ability to function effectively even where no strict pledge of confidentiality is at issue. The spectacle of newsmen testifying before grand juries and investigative bodies identifies the news media in the public mind as an investigative arm of government. People who talk to reporters and who allow themselves to be filmed will become more cautious if they perceive reporters as police accessories. Lines of communication between the press and the disaffected groups in our society, which are difficult enough to maintain because of mistrust of the establishment, will become more difficult. The press will face new obstacles in digging behind official handouts and press releases. There will be a lot the public will never know. The free flow of information, which is the foundation of intelligent self-government, will be less free.

In conclusion, ABC urges this Congress to act now to afford newsmen and the news media absolute privilege against compulsory disclosure of information and sources in any federal or state forum. We believe this approach is necessary to preserve the public's right to a free flow of information, and we will support any bill which in our judgment achieves this objective.

STATEMENT OF HON. GEORGE MCGOVERN, U.S. SENATOR FROM SOUTH DAKOTA, FEBRUARY 27, 1973

Mr. Chairman, I found it particularly appropriate that the Governor of New York last week urged this committee to report out a strong bill protecting the rights of newsmen. For it was his colonial predecessor who, even before the Founding Fathers wrote the Constitution, inadvertently established the American principle of a free press by prosecuting Peter Zenger.

Zenger's successful defense established a principle in which I firmly believe—that the press has essentially an adversary role toward those of us in Government.

That principle has served us well from the time of George III through Tea Pot Dome to Watergate. If we sacrifice that principle now in a time of increasing governmental secrecy and sophisticated propaganda, we will deprive ourselves of the most important constitutional check against what Thomas Jefferson called "the tyranny of government."

The Supreme Court has now held that the freedom of the press does not include freedom to keep sources and unpublished material confidential. I am not the constitutional lawyer that you are, Mr. Chairman. I cannot comment fully on the legal wisdom of that decision; but its practical effect is all too obvious.

If a Pentagon employee knows that gross mismanagement (or perhaps even dishonesty) has resulted in a billion dollar cost overrun will he now give this information to a reporter? Under the pretense of investigating the allegations, the government can obtain the employee's name and quietly "promote" him to a less sensitive position or discover that his services are no longer needed.

I personally believe that the excellent expose of the Watergate affair by The *Washington Post* and other papers may have been severely hampered by the government's attempt to ferret out the sources of the *Los Angeles Times*. Perhaps even your investigation into that scandal has been adversely affected.

The problem will not be solved by giving newsmen protection against the federal government alone.

Our country was recently rocked with scandals of graft and corruption among politicians in New Jersey and police in New York City. The *New York Times* and other papers aggressively sought out the stories and courageously published them. But where would they have gotten their facts had their sources been subject to retaliation?

Once we seal the mouths of newsmen we seal the lips of their sources. And if our citizens are deprived of the facts, how will they learn about misconduct in government?

Those, I believe, are the real issues for your consideration.

I believe the first amendment was intended to protect a free and responsible press. But recent court actions have clouded that purpose. Strong legislative action is now needed to protect newsmen and their sources.

Newsmen seldom witness crimes; their information is generally hearsay.

The initial leads published stories supply can be fleshed out by hard and careful investigation. I doubt prosecutors claim to be less able than reporters.

I personally agree with the view expressed by some, including Mr. Ben Bradlee of The *Washington Post* that the legislation you are considering may ultimately prove to restrict the historic rights of the press.

However, I understand that the risks of inaction may be greater than those of action. Too many newsmen have already been jailed; too many sources may already have dried up.

As I stated earlier, I believe the legislation you report out should reach the states as well as the federal government. I understand that recent Supreme Court decisions (such as ***South Carolina*** vs. ***Katzenbach*** and ***Katzenbach*** vs. *Morgen*) make it clear that Congress has the right to do this under Section 5 of the 14th Amendment.

In addition, the bill must be clear that it does not convey the right for anyone to obtain informatioa from the press. Rather, the bill must be strictly remedial—defining those areas in which there should be an absolute privilege against disclosure and prescribing careful safeguards in other areas.

I think the absolute privilege should extend to:

First, all legislative investigations, and

Second, to all criminal investigations and prosecutions.

I understand the pressures to compel a newsman to reveal information that could save a life or save the nation from grave peril, as the bills before you provide.

However, should you adopt that proposal, I suggest you limit such information to be used to save and not to prosecute. The government should keep the information confidential. The fruit of the poisonous tree doctrine should not apply to such cases.

We should prescribe careful judicial procedures to insure those safeguards. In national security cases, a judge should determine the sensitivity of classified material and not have to rely on the government's classification.

There are two areas which are not dealt with comprehensively in the legislation before you which may soon be before the Supreme Court—the potential conflict between the first amendment and the due process clause as well as the sixth amendment. The Sixth Amendment grants a criminal defendant the right to subpoena witnesses in his or her own defense. Certainly a man on trial for murder is entitled to any exculpatory information a newsman may have. However, we should adopt a procedure which insures that process does not become a fishing expedition.

A similar option should be available to newsmen in the civil suits for libel or whatever when the inquiry turns to confidential sources or unpublished information. Certainly one should be able to sue for a vicious libel; but newsmen's sources should not be needlessly compromised thereby.

The procedures used in the recent Watergate trial seem sensible to me. There the judge heard testimony in secret and the newsman had the right to appeal his adverse decision before being compelled to testify. In each case the burden should be on the party seeking the information to prove the relevance of the information sought by clear and convincing evidence.

Mr. Chairman, newsmen have historically been among the most patriotic of Americans. I do not think there is any substantial fear that they will cease to be so. If the press has information the national interest requires, I am confident they will make is available. Compulsory procedures are not needed and have proven harmful.

The American press is generally recognized as being the best in the world. I don't think their reputation is coincidental to the freedom they have enjoyed. If we take away that freedom, we will all of us lose the freedom that is made possible by the free flow of ideas and information.

Statement of Edward Miller, Call-Chronicle Newspapers, Inc., Allentown, Pa., February 13, 1973

This is a joint statement by the Call-Chronicle Newspapers, Inc., and Local 49 of The Newspaper Guild before the Senate Judiciary Subcommittee on Constitutional Rights, the Honorable Sam J. Ervin, Jr. presiding, on February 20, 1973.

The Call-Chronicle Newspapers, Inc., is a combination of three general-circulation newspapers (morning, evening and Sunday) with a combined daily circulation of 127,000 and a Sunday circulation of 147,000. Published in Allentown Pennsylvania, these newspapers serve nine counties in eastern Pennsylvania and western New Jersey including the Allentown-Bethlehem-Easton metropolitan area, third largest in Pennsylvania.

Local 49 of The Newspaper Guild is a professional organization representing some 125 employes of the Call-Chronicle Newspapers, Inc.

The Newspaper and the Guild wish jointly to express to Congress our apprehension over a recent trend by public officials at all levels of government to annex the press as an agent of their public policies.

We find chilling confirmation of our view in the minority opinion on the *Caldwell* decision handed down last year by the Supreme Court. Speaking for three of the four dissenters, Justice Potter Stewart warned that the *Caldwell* decision "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of Government."

We believe this trend denies the unique and precious role of the press in our American form of democratic government. Our Constitution created a position for the press as one of the so-called checks and balances in American government. By assuring freedom of the press, the Constitution affirmed the absolute autonomy of the "fourth estate."

The underlying philosophy of that Constitutional guarantee, we believe, is that a freely informed citizenry is necessary to make democracy work well, and that there is virtually no hope for an untrammeled flow of information to the public if the media are constantly under the sword of government intervention.

But we believe the recent trend toward annexation is raising that very sword above our heads.

The most insidious manifestation of that trend is the growing willingness of investigators and law-enforcement officials to subpoena newsmen in efforts to prosecute their cases, some of which would not exist were it not for the prior and independent efforts of enterprising newsmen.

We believe it is now the clear duty of the Congress to put an end to the ability of prosecutors to annex the newsroom to the attorney general's office.

We urge Congress to enact unconditional privileges for newsmen that will shield them, under any circumstances, from being pressed into service as a surrogate government investigator.

We defer to Congress' wisdom to formulate the exact language and legal construction of such a measure. But we certainly urge Congress to eschew conditional measures, especially those that would permit forced disclosure when the information cannot be secured elsewhere. Such conditional bills, we feel, are not at all in keeping with the spirit of what needs to be done and they might even encourage the abuses we seek to preclude by specifying conditions under which a government prosecutor may legally annex the newsroom.

There are critics of newsmen's privileges who question whether journalists should be accorded special rights that the general public does not enjoy.

Our reply is that such protection, when accorded to a newsman acting in his professional capacity, is unquestionably necessary to maintain the confidence of reluctant sources, and so the flow of otherwise unobtainable material to the public. The fact is that newsmen in this country bear Constitutional responsibilities that are quite different from those borne by the general public, and we feel that a commensurate differential in Constitutional rights is justifiable.

In conclusion, we urge this committee and the Congress to re-affirm the first amendment separation between government and the press by enacting an unconditional newsmen's shield law that will allow newsmen to accept information from confidential sources without fear of being compelled to identify those sources or reveal unpublished information, under any circumstances, by government investigators at any level under Congressional jurisdiction.

We thank the committee for this opportunity to offer our views.

EDWARD D. MILLER,
Executive Editor, Call-Chronicle Newspapers.
PAUL D. LOWE,
President, Local 49, TNG.

STATEMENT OF TOM MILLER, TUCSON, ARIZ.

Since June, 1968, I have been engaged as a professional reporter and writer. Between January and June, 1969 I was a fulltime editor of College Press Service in Washington (CPS, since relocated in Denver, is a daily news and feature service which has as its recipients hundreds of college, community and alternative newspapers around the country.) Other than that, I have been self-employed as a free-lance writer and reporter, having written for scores of newspapers and magazines serving areas from small communities to the entire country. Most of the subjects I have written about involve anti-authoritarian groups, decidedly unorthodox and quite alien to the norms of society. Because of their activities and my closeness to them in outlook and professional capacity, both the subject matter and, to a lesser degree, myself often find ourselves under surveillance, investigation and general harassment from governmental authorities.

In the summer of 1971, I was subpoenaed to appear and testify before a federal grand jury sitting in Tucson, Arizona, which was then and is now my residence. The grand jury was investigating various forms of anti-war and radical activity, much the same type of subject matter I was writing about for underground and alternative publications. Orchestrating the grand jury proceedings were lawyers from the now-defunct Internal Security Division of the Justice Department. Through my attorney, Mark Raven of Tucson, I refused not only to testify, but even to appear. This distinction is important—refusing to testify can mean you will go behind the closed door of the grand jury room into the private proceedings. Refusing to appear, of course, means the opportunity to even refuse testimony does not come about. My refusal to appear was based on first amendment grounds protecting a free press. By merely going behind closed doors, the news sources with which I dealt could not be sure if I said anything. The appearance of a reporter going involuntarily to a grand jury inquisition casts a doubt—even a slight shadow of doubt in the eyes of many, enough so that certain organizations and individuals would refuse to co-operate in my further news-gathering efforts. And if one writer, whom they had previously trusted had gone before a grand jury, it makes it all the harder for other journalists to gain the confidence and information these sources have.

The Justice Department refused to recognize my status as reporter. They claimed I made a "less than adequate showing that" I engage "in the occupation of a reporter." "The United States submits," the Justice Department told the court, "that without some more definite proof such as copies of income tax returns showing his occupation and his income from such occupation, Miller should not be recognized as a member of that class . . ."

The judge (William Frey, U.S. District Court for Arizona) thought otherwise and allowed my claim of reporter to stand.

The government, in its appeal brief, still contested this standing. And what was the reasoning of the Internal Security Division? "At no point does he disclose his present employer. To the contrary, it appears from his supporting affidavit that he has not been actively employed since 1969. He is considered by his peers to be a 'stringer' or 'free-lance writer' and a source for information rather than a newsman. For these reasons, it is clear that appellee has not met the first requirement—he is not a reporter." Further, the government refused to admit the sensitive nature of the subject matter I was usually dealing with. Their entire legal attack on my position was an arbitrary attack on the status of free-lance journalist, and quite implicitly, on those who have close ties with radical thought and activity in this country. The chronology of events in the case, in summary, is that Judge Frey ruled that an *in camera* hearing be held to determine whether there was a compelling need for my testimony. The government refused to appear at the hearing (after having earlier said they could make such a showing), and the judge quashed the subpoena. In September, 1971 the Justice Department appealed the lower court ruling to the Ninth Circuit Court of Appeals. In June, 1972 following the *Caldwell-Pappas-Branzberg* decision, the Justice Department filed a supplemental brief asking that the lower court order be overruled since the case was predicated on *Caldwell*, which it followed through the Ninth Circuit. I filed a motion asking that the government appeal be declared moot, the grand jury which subpoenaed me having been discharged and a new one impaneled. In December, 1972 the Ninth Circuit Court of Appeals so ruled, and the Justice Department entered no further appeal.

Virtually point by point, the actions of the Justice Department refute their own internal "guidelines for subpoenas to the news media." Although the guidelines say they do not consider the press "an investigative arm of the government," that is in fact what they would have me be. The "reasonable attempts" to obtain information from non-press sources before considering a press subpoena were not evident. There was no "negotiations with the press" when the subpoena was contemplated. As a result, the second part of item #3 in the guidelines did not follow, to wit: "the government shall make it clear what its needs are in a particular case as well as its willingness to respond to the particular problems of the news media." Further, the guidelines state that a subpoena issued to the news-media without the authorization of the Attroney General should be quashed as a matter of course. This was not advocated by the Internal Security Division either.

In summary, the Attorney General's guidelines did not protect any rights in my case, in fact the Justice Department did all it could to refute my legitimate claim as a reporter. The guidelines, since they do not define what is media and what is not, leave large substantive issues to the U.S. Attorney's interpretation and discretion. Furthermore, since they are internal departmental guidelines, they can be amended or discarded at will. Because of the complexity of the news gathering profession there are numerous postions which are vital to the process, and any "shield law" which omits any segment of the news-gathering and disseminating process weakens the entire objective. If a law which has as its purpose to uphold a free press omits any part of the press then the whole law is ineffective. Certainly a free-lance writer or television camera operator is just as much a part of the process of collecting and sending out news as a *New York Times* correspondent or a network television reporter. Unless a "shield law" is as strong in its detail and as the first amendment is in principle, it dilutes the idea of an unemcumbered free-flow of information. If a news gatherer is compelled to testify against his or her will, that person's ability to gather more information is substantially reduced. As the Justice Department so ably demonstrated in my case, left to its own devices, any loopholes and circumventions it can carry out, it most likely will. Only a law as strong and all encompassing and unqualified as the first amendment itself can remedy the tendency of government to utilize newsgatherers for its own ends.

STATEMENT OF NATIONAL NEWSPAPER ASSOCIATION, MARCH 28, 1973

INTRODUCTION

The National Newspaper Association shares with the members of the Senate Constitutional Rights Subcommittee the views of its members on the questions now before this Committee. We sympathize with the difficult decisions you will have to make in coming weeks in wrestling with the many issues which this legislation encompasses.

On March 1, 1973, representatives of this Association appeared before the House Judiciary Subcommittee which is considering similar bills. Although NNA made every effort to appear personally before the Senate Committee, we were unable to do so because of the many pressures for time before the Committee. We are asking that this statement be made a part of the hearing record on this legislation. We hope the Committee members will consider it fully, the same as if it had been presented in person.

THE PATH WE HAVE TRAVELED

Many words have been written and spoken on this subject both before and since the decision of the United States Supreme Court on June 29, 1972. None, however, have been so eloquent nor have any been more lucid in their statements of what a free press means than were those of Thomas Jefferson, James Madison, Thomas Paine and many others who wrote of the need for a free press at the time this great nation was being founded.

The principle involved simply cannot be more clearly stated than in the First Amendment itself:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . .".

We would first like to outline some of the decision-making process that has gone on within our own Association since the decision of the Supreme Court in the ***Branzburg, Caldwell*** and ***Pappas*** cases. Prior to that decision, this Association actively participated in the "Freedom of the Press" hearings conducted by this Committee.

Shortly after the decision, the members of the National Newspaper Association met in annual convention in Portland, Oregon. In a highly charged atmosphere they approved a resolution calling for the adoption of completely unqualified Federal law to protect news sources and unpublished information.

A few months later, when emotions were not running quite so high, the president of the National Newspaper Association told a House Judiciary Subcommittee that a qualified bill, while not our first preference, would be satisfactory, especially since many media groups had agreed on one *type* of a qualified bill.

During rather intense questioning by members of the House Subcommittee several thoughtful questions were raised as to how those qualifications could be written so as to produce meaningful and protecting legislation. We have been thinking about and discussing those questions ever since and the answers are not satisfactory to us.

Also, since the time of our testimony last fall, we have seen several newsmen go to jail for refusing to name confidential sources or provide courts and grand juries with unpublished notes or tapes. Some of them went to jail in states which had what were thought to be absolute legislative protections against compulsory disclosure. Even in those cases where the state law was thought to have provided absolute protection, however, the courts interpreted the law in such a way as to require compulsory disclosure or jail for newsmen who refused to reveal their sources or unpublished notes or tapes.

WHAT IS NNA?

For the members of this Committee who are not familiar with NNA, let us review briefly what NNA is and who it represents.

NNA was founded in 1885 as the National Editorial Association. Its purpose, then and now, is to serve the needs of the weekly and small city daily newspapers of this country, of which there are more than 8,500 today. In 1959 its offices were moved from Chicago to Washington because of the ever increasing presence of the Federal government in the lives and business operations of its members. Shortly thereafter, to avoid confusion of its former "alphabet" name—NEA—with at least one other association and a newspaper syndicate service, NEA changed its name to National Newspaper Association—NNA.

Today, NNA is a full service trade association serving the needs of about 5,500 weekly and 1,000 daily newspaper members. Our membership continues to grow despite the fact that the total number of newspapers decline slightly each year. Total circulation of NNA's member newspapers increases appreciably every year, however.

NNA WANTS NO ABRIDGEMENT OF FIRST AMENDMENT

Through discussions and correspondence, NNA members have urged the Association to support legislation granting ***absolute*** protection for confidential news sources as well as all unpublished information. For that reason and because of serious misgivings about the effectiveness of anything less than absolute protection, NNA urges this Committee to recommend such a bill.

We firmly believe that anything less than absolute protection will really be no protection at all. Despite the rhetoric which has accompanied the introduction of most of the qualified bills pending before this Committee and in the House, despite their sponsors' statements of wanting to protect freedom of the press and the free flow of information, no qualified bill will accomplish what its sponsors claim. We believe that rather than reinstating the first amendment's guarantees, such bills would in fact do what it prohibits—namely, "abridge" those rights.

Qualified "protection" answers no questions at all for journalists or for their sources. Who can say with any degree of certainty how a court would interpret a qualified law? Lawyers, judges, indeed the members of this Committee, will not be able to give assurance to any reporter or to news sources that what is said in confidence can be protected from compulsory disclosure before courts and grand juries if Congress approves only a qualified law.

The members of our Association can ill afford the financial burden of settling these questions in test cases following the subpoenaing of reporters, editors or the publishers themselves.

In addition to the financial expenses involved in appealing adverse court rulings in such cases, NNA member newspapers would face serious consequences were a busy reporter or editor actually jailed for refusing to disclose sources. Such an occurrence would cause a severe loss since the typical NNA member does not have extra personnel available to replace or assume the duties of anyone lost to the local jail. And they cannot call up to hire a "temporary" editor or reporter in the communities served by NNA members.

While we know of no case involving the jailing of such newspaper men, we think the members of this Committee can fully appreciate what it would mean to the continued operation of that type of newspaper were such an occasion to arise, as well as the very real possibility of such an occurrence.

If even the members of this Committee, or lawyers or judges cannot confidently foretell how the courts would interpret a qualified law in specific cases, how is a publisher or a reporter or editor of a 2,000 or 3,000 circulation weekly newspaper in the Mississippi Delta or the mountains of Appalachia or the wide-open country of the far West supposed to know exactly what his rights or the rights of his sources are under such a law?

The answer is that he cannot. As a result, he will either continue to risk jail (perhaps in unknowing reliance on the first amendment) or will recede from his responsibilities and thus not serve the public—his readers—as the first amendment intended him to be able to do.

Finally, a large measure of our purpose in submitting this statement today is to assure the members of this Committee that it is not only the members of the metropolitan press who are concerned with the issues involved in the legislation you are studying. Newspaper publishers everywhere are vitally concerned and asking questions.

Most who talk to us are of the very sincere belief that anything less than an absolute law will be useless and of no effect so far as they, their reporters and news sources are concerned.

Attached to this statement is a brief analysis of some of the issues relating to the questions involved in this legislation that has been prepared by NNA's general counsel. We would like to make it a part of our statement and submit it for inclusion in the record of the hearings.

Statement of the National Newspaper Publishers Association

RESOLUTION PASSED BY THE BOARD OF DIRECTORS OF THE NATIONAL NEWSPAPER PUBLISHERS ASSOCIATION ON JANUARY 27, 1973

Whereas the Black press and Black people have suffered varying forms and degrees of official oppression for more than three centuries in America, and;

Whereas this suffering has led us to a special interest in and understanding of the painful and stifling dynamics of oppression, and;

Whereas the first amendment to the Constitution of the United States prohibits governmental action restricting the freedom of the press, and;

Whereas press attempts to inform and thereby protect the American people in recent years has promoted increasing and unprecedented reaction and repression on the part of the Federal Government, and;

Whereas current efforts by the executive and judicial branches of the Federal government to intimidate, subjugate and demoralize newsmen through subpoenas and jailings have begun to chill the free flow of information between the press and the people, and;

Whereas such efforts include attempts to force newsmen—both Black and white—to degenerate to the level of police informers and spies upon the communities their ethics and professional skills are designed to protect, and;

Whereas well-meaning attempts by some Congressmen to remedy this chill by new federal legislation if successful, would fly in the face of the first amendment prohibition that "Congress shall make no law abridging freedom . . . of the press," and;

Whereas such laws if passed by Congress, would further threaten a dissolution of constitutional relevance and authority, and;

Whereas, through its power to license electronic media, the Federal government is attempting to buy the independence and integrity of radio and television news of which NNPA is both skeptical and vigilant, and;

Whereas the peoples' right to know is gravely endangered by current governmental action against the press and the people, and;

Whereas, in the word of the Credo of the Black press, "The Black press believes that America can best lead the world away from a racial and national antagonisms when it accords to every man, regardless of race, color or creed, his human and legal rights;

The National Newspaper Publishers Association therefore

Resolves, That:

As a responsible segment of the press, we will continue the tradition begun in *Freedom's Journal* by John Russwurm and Samuel Cornish 146 years ago, to wit: stoutly defending its people, its own rights as a free press, and the achievement and preservation of a free society;

We will renew efforts to advise and inform our audiences on the key role a free press plays—and must play—in the preservation of liberty and welfare:

We will support the first amendment as the broadest and best guide to press freedom, and will steadfastly resist governmental and any other efforts toward intimidation, subjugation and demoralization of the press and its members.

We call upon all other information and education segments of our Nation to re-dedicate themselves to the principles of freedom embodied in the first amendment and to the re-education of the American people to those principles, and

We will continue, even with renewed vigor, to implement an additional portion of our Credo: "hating no man, fearing no man, the Black press strives to help every man in the firm belief that all are hurt as long as anyone is held back."

STATEMENT BY THE PENNSYLVANIA NEWSPAPER PUBLISHERS' ASSOCIATION

Thank you for the opportunity to testify before this Subcommittee on Constitutional Rights.

The Pennsylvania Newspaper Publishers' Association is a 49-year-old association of Pennsylvania daily, weekly and Sunday newspapers. PNPA now represents 304 member newspapers. A primary objective of the association is to promote the interests of its members and advance their services to the people.

We support Senator Alan Cranston's S. B. 158 known as "The Free Flow of Information Act."

Our endorsement of "The Free Flow of Information Act" stems from our conviction that it protects the public's right to know by granting unqualified protection of reporters' sources and news media materials. Without such protection it is conceivable news sources would dry up and that enterprising reporting would be discouraged. We believe the media should not be in jeopardy of being penalized in any way for performing their duty of informing the public.

This principle was upheld by the Pennsylvania Supreme Court in 1963 when the Court nullified contempt-of-court convictions of a major newspaper's president and city editor who refused to give a special grand jury information about alleged city hall corruption. Chief Justice John C. Bell, Jr., who presided over this first court test of the 1937 Pennsylvania statute giving newsmen the right to protect their sources of information, observed, "Independent newspapers are today the principal watch-dogs and protectors of honest, as well as good, government." He noted that without protection of sources, newspapers would be unable to receive tips and leads on official wrongdoing.

Justice Bell said, "It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion."

It is not a biased or selfish interest on the part of media that is in question—it is the American people's fundamental right to information that is rightly theirs.

The purpose and duty of the press is to provide the public with information. The American people have a Constitutional right to information. An informed people is essential to the success of our democracy. And protection of news sources at both state and federal levels is essential to an informed people.

Reporters should have the same professional relationship with their sources that the doctor has with his patient, the lawyer with his client and the priest with his parishioners. Otherwise what other relationship can there be to guarantee the freedom to research a story to give the public the information it should have?

S. B. 158 would enforce the guarantee under the Constitution's first amendment and would protect the people's opportunity to obtain all the information possible. We believe it would be no less than an imperative safeguard of the public's right to know.

Thank you for your consideration.

STATEMENT BY THE SOCIETY OF MAGAZINE WRITERS, INC., FEBRUARY 20, 1973

The Society of Magazine Writers was founded in 1948 as a national organization of professional freelance writers selling to magazines. It now numbers more than 300 members in more than 30 states and foreign countries, most of whom write nonfiction books as well as magazine articles. Members of the Society have written many of the most important and most influential articles that have appeared in national magazines over the past two decades. They have covered almost every subject field: science, human relations, crime, politics, health and medicine, social change, race relations, education, and so forth. Many of the books written by Society members have been concerned with the major issues of our time. They have included some of the most important books on contemporary public affairs and numerous best-sellers.

The Society believes firmly in the principle of confidentiality under which responsible writers have traditionally obtained information from many sources. The Society is deeply disturbed by the recent attempts by various officials to compel writers to give up their traditional right to protect their sources. The freelance writer is opposed to the use of the subpoena power by any official, high or petty, to force him to expose information which in his good judgment he should not expose. His position in this regard is just the same as that of the salaried news reporter. There is no need, therefore, for the Society of Magazine Writers to repeat in detail the arguments for a free press and an informed citizenry that have been presented to this subcommittee by others.

The Society does wish to stress certain points bearing on the subject of these hearings that are of particular interest to its members.

First, it is important to protect the liberty of the writer and the source of information in cases where research and writing are done on a freelance, rather than a salaried, basis. Protective legislation should be phrased so as to cover all professional writers, including freelancers, and not just "newsmen" or "reporters"—terms which connote salaried members of newspapers and magazine staffs. A large part of the original reporting and writing under consideration here is freelance work, which is published in magazines and books. Most members of the Society of Magazine Writers are engaged in freelance magazine and book writing.

Protective legislation is certainly needed for the salaried writer, who may be supported by the financial and legal resources of a publishing company. But such legislation is needed even more by the freelance, who usually does not enjoy any such corporate support when he must fight for his liberty against authorities who can marshal the public treasury and a battery of lawyers to oppose him.

Second, it is absurd for any official to claim that professional writers must be compelled to divulge information if we are to prevent possible crimes and protect the country from its enemies. Professional writers are as law-abiding, as respectful of property rights, as patriotic and as full of commonsense as anyone else. The suggestion that writers gather all kinds of criminal and conspiratorial secrets, which must be extracted from them by the authorities, is comic-book stuff. Yet those officials who would use the subpoena power to force writers to name names and hand over papers have been making this ridiculous claim.

The real issue is that the good professional writer has often gathered background facts in order to write informed, soundly based articles and books. From long experience he has learned that all kinds of people—and not merely guilty people—have sound reasons for not wanting their names used in connection with information they give to writers whom they respect and trust. The public benefits every day from this understanding between professional writers and their sources. It is important to our free institutions that all Americans feel confidence in talking to the press—to know that they are dealing with independent professionals, rather than with agents, under duress, of Big Brother.

Third, the issues involved in this legislation are basically the same at the state and the federal level. A writer may want to protect his sources as he follows leads in city hall, the state house, a business, a profession, or in federal government. The Society therefore supports legislation to protect writers' sources against either federal or state subpoenas.

Fourth, on the matter of a qualified or an absolute privilege—we see no logical line to draw, a line beyond which the privilege should not extend. An over-eager official can always exaggerate his claim of the importance of the testimony or the notes he needs in order to overcome a qualified privilege. We therefore favor an absolute privilege. We repeat—if the matter at issue is really grave, the sensible, law-abiding, patriotic professional writer does not require coercion by subpoena to do his duty.

Fifth, on defining who is to enjoy the nondisclosure privilege—the Society of Magazine Writers has no desire to be exclusive or elitist. It is not simple to define exactly who can be called a writer. But it is not difficult to identify the professional writer: he or she has a clearly recognizable body of published work, in newspapers, magazines, books or other communication forms. The Society therefore urges that this legislation designate protection for professional writers, and leave interpretation of that term, should it ever beceome necessary, to the courts.

STATEMENT BY HON. JAMES V. STANTON, A REPRESENTATIVE IN CONGRESS FROM THE 20TH DISTRICT OF THE STATE OF OHIO

Members of the Subcommittee, I am greatly honored to appear before you today, and to have this distinguished panel of the Judiciary Committee consider my legislation on this highly important topic. As the title says, H.R. 3725 is intended "to protect the public's right to know."

The bill is very brief. It is limited to two sentences. At the outset it says: "No person shall be required by any Federal Court, grand jury, or agency, or by the Congress, to reveal any information, including the source of any information, obtained in the course of that person's involvement in the obtaining of news for broadcast, or written or pictorial dissemination to the public."

It concludes with this second sentence: "As used in this Act, the term 'person' includes any corporation, company, association, firm, partnership, society, or joint stock company, as well as any individual."

You will note, of course, that this bill makes no exceptions. It is completely devoid of any qualifying language. If enacted, it would *absolutely* protect newsmen and newswomen against any attempt by governmental authorities to force them to reveal their sources of information, either directly or indirectly.

The protection it affords to journalists, however, is incidental. Our only concern here is not to keep journalists out of jail, or to shield them from subpoenas. We are concerned with a matter much more basic, going to the very heart of public policy in a democracy. That concern is protecting the *public* interest by assuring a free flow of information.

Now, it always sounds grandiose and perhaps somewhat self-serving when a Congressman speaks of "the public interest". Opponents of this legislation in the Nixon Administration would probably say I am using that phrase as a cover for protecting what really amounts to a *special* interest—namely, the news media.

I would make two points in reply. First, that the most direct route to "the public inerest" is often indicated by the direction that a newsman happens to be pointing his pencil. Second, however—and, I submit, more important—is the fact that inherent in my legislation is a real solicitude not merely for newsmen but *also* for those persons who become their confidential news sources.

It is *they* who need protection perhaps more than journalists. For if the identity of the informant is forced into the open, he or she could become the target of a whole range of retaliatory actions. They would become so vulnerable that they would hesitate, to say the least, before imparting any information to a newsman, no matter now important it might be for the public to know the facts involved. Therefore, it is essential, if we want to encourage a free flow of information to the public, to enact legislation that protects not merely the conduit but also the *source* of such information.

Moreover, it is important that the source have no doubt that he is, in fact, protected. This is why a bill couched in absolute terms, as mine is—as the Bill of Rights is—is vital. If we were to enact a law saying that news sources are shielded except under certain circumstances—a law qualified by a list of "howevers"—then the source could have no assurance that his anonymity would be preserved. He would have the burden of trying to figure out beforehand whether he could, or could not, trust the law should he choose to let the public in on official secrets that really ought not to be secrets. His tendency then would be to play it safe—to adopt a personal policy which, in effect, would boil down to this: "When in doubt (which could be most of the time) keep quiet. Perhaps the people might find out some other way."

Under H.R. 3725, though, the source would *know* that the journalist he is dealing with could not be compelled to reveal his identity. His only problems, then, would be (a) whether he feels he could trust the journalist to fall back on this law, if that becomes necessary, and (b) whether he feels that he can indeed, in good conscience, violate the confidence of his superiors in the agency where he became privy to the classified information.

This latter consideration has its own implications in terms of good public policy but these, I submit, while indeed important, fall outside the purview of the issue concerning us here. In this connection, though, I think we ought to be cognizant of a basic distinction between the newsman and the news source. While the news source (if he is a public official) is an agent of the state, properly subject to disciplinary sanctions (no matter how high his motives) when he leaks information and gets caught doing it, the newsman himself is *not* an agent of the state. To force him into the role of state's agent, under threat of imprisonment, is to tamper with and abridge freedom of the press. Worse yet, it would create substantial doubts in the mind of the public that the press is, in fact, free—a neutral force interposing itself between the people and their Government, in order to help the people exercise those rights that are reserved to them under our Constitution.

With the foregoing constituting the rationale, as I see it, for a statute conferring absolute immunity, I would like to call your attention more specifically to the scope and the phrasing of H.R. 3725.

As is evident, this bill would extend immunity to newsmen only in those cases where the federal Government has jurisdiction. While I would be very pleased if this Subcommittee were to approve a bill conferring the same immunity with respect to state and local government, I suspect that Congress lacks authority to legislate in this area for States and their subdivisions.

The phrase "no person" applies to *any* person in the United States. In other words, the bill is not restricted in its coverage to professional newsmen or authors only. I don't think we can come up with a suitable definition of what is a professional newsman. But even if we could, I don't think we should limit the protection. A pamphleteer or the avocational publisher of a small newsletter, which he might distribute even free of charge, potentially has the capability of developing confidential sources of information—and information disseminated by him might have as high a degree of validity as the contents of our daily newspapers or better known magazines.

The "no person" formulation also affords protection to *former* newsmen who might be otherwise employed at the time an official inquiry is launched. Again, I think we must keep in mind the fact that we want to assure persons with information to impart that they need not fear forced betrayal by the newsman receiving the data. Informants naturally would feel inhibited if they could be certain of protection only on a temporary basis—only during the time that their contact remains employed by a given news organization.

"Any information" refers, of course, to notes and other materials in the possession of a writer or broadcaster which were not published or broadcast. Were a newsman forced by a subpoena to produce this background data, he might indirectly lead his inquisitors to the confidential source of information, since in many cases inferences could be drawn by investigators examining the material.

Section 2 further defines the term "person" and makes it clear that the word includes corporations and other business entities. I feel this is needed because organizations employing newsmen often have physical possession of his notes and other materials, and we ought to have a statute protecting them, too, against forced disclosure.

Thank you very much for your attention. I think I have covered now the salient points of H.R. 3725, and I would be happy to answer any questions you might have.

STATEMENT OF JOHN B. SUMMERS, GENERAL COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS, MARCH 9, 1973

Mr. Chairman, my name is John B. Summers. I am General Counsel of the National Association of Broadcasters which is located at 1771 N Street, N.W., Washington, D.C. The NAB is a non-profit trade association which has in membership 3,601 AM and FM radio stations, 530 television stations, and all national radio and television networks.

The National Association of Broadcasters welcomes this opportunity to support the enactment of S. 158 which will afford newsmen an unqualified privilege against the disclosure, in any Federal or State proceeding, of either their source of information or their unpublished information.

Protecting the newsman so as to insure a free flow of information to the public is of paramount interest to NAB because of broadcasting's importance to our nation's system of communications. The radio and television media have for some time been assuming an ever expanding role in the process of gathering and disseminating news. The heavy reliance of the public on broadcast media as its principal source of news and information underpins the vital need to assure that radio and television newsmen are not impeded in their news gathering functions. Indeed, a television newsman-photographer was the focus of one of the three cases dealt with by the Supreme Court in the *Branzberg* v. *Hayes* decision which triggered the current need for legislative relief.

Following the Supreme Court decision in *Branzberg* v. *Hayes*, it became apparent that if newsmen were to be protected as to their sources and unpublished information this would have to be accomplished through appropriate legislation. Indeed, the Supreme Court expressed the view in that case that Congress is free to determine whether a statutory newsmen's privilege is necessary and to fashion standards and rules "as narrow or broad" as demeed necessary to cover any evil it might discern.

At first blush, it appeared to many in broadcasting that some kind of qualified statutory privilege would provide adequate protection to insure the free flow of information to the public via this nation's broadcasting system. However, this earlier reaction has been altered significantly by the events which have followed in the wake of the *Branzberg* case. Four newsmen have already gone to jail for refusing to divulge confidential information to courts or grand juries and several others have faced sentences for denfying court orders to reveal sources or unpublished information.

Against this backdrop, it is now clear that Federal legislation dealing with newsmen's privilege must be absolute and must apply to all governmental proceedings, both State and Federal. In the latter respect, it is noted that most of the actions taken against newsmen since *Branzberg* have occurred at the State level.

We are fully aware of the views and arguments in opposition to the concept of absolute immunity for newsmen. The parade of horribles which can be assembled under the absolute approach is long and imposing, but it is largely conjectural. We know of no cases where newsmen have impeded justice by withholding information relative to serious crimes, national security, or other matters of paramount public concern. In effect, the opposite is true. Newsmen, where able to protect confidential sources, have been instrumental in ferreting out crime. Some vivid examples of such accomplishments by broadcasting and the print media were offered in the October 4, 1972 statement of Senator Cranston before Subcommittee No. 3 of the House Judiciary Committee.

The real issue before Congress is whether newsmen will be protected so as to insure they can fully perform their role of informing the public without government interference or intimidation at any level—be it local, state or Federal. Any qualification appended to a statutory newsmen's privilege, irrespective of how well intentioned, would bear the seeds of such governmental interference or intimidation, for any qualification would necessarily be subject to varying interpretations by a wide range of judicial and quasi-judicial authorities at diverse levels of the governmental structure. Examples of such erosion have already been witnessed under qualified state shield laws which were supposed to protect newsmen's sources and information.

We submit the public interest in preserving the free flow of information to the people far transcends the conjectural evils which underpin the arguments for a qualified privilege. The newsmen serving this nation's communications media must, at the very least, be accorded an initial absolute privilege if the public is to be so served. Should experience under such an absolute privilege result in serious abuses of that right, then Congress would be free to consider remedial legislation.

In view of the foregoing, the NAB strongly urges passage of S.158 which would establish an unqualified newsmen's privilege applicable to state as well as Federal proceedings.

Thank you for affording us the opportunity to submit this statement.

STATEMENT OF HON. CHARLES W. WHALEN, JR., A REPRESENTATIVE IN CONGRESS FROM THE 3RD DISTRICT OF THE STATE OF OHIO, MARCH 15, 1973

Mr. Chairman, I am pleased to have this opportunity to submit a statement in behalf of the Free Flow of Information Act, legislation I have introduced to insure the confidentiality of journalists' sources and information, thereby insuring the people's right to know.

This distinguished Subcommittee merits commendation for its continuing sensitivity to first amendment freedoms. The now-famous hearings in 1971 and 1972 on the Freedom of the Press revealed a number of threats to the first amendment, including the problem which the Free Flow of Information Act is designed to resolve—the power of the government to harass and intimidate journalists by issuing subpoenas. In fact, I was honored to lead off those hearings in September 1971, and I devoted my testimony exclusively to the subpoena problem.

The reasons why I believe protective legislation is necessary have not changed since I testified in 1971. In my original testimony, I outlined how the subpoena power imperils public access to valuable information. For the sake of brevity, I will not repeat those comments here. I should note, however, that an intervening event between my initial testimony and my statement today has made the argument for a legislative remedy even more compelling. I refer, of course, to the Supreme Court's ruling in *Banzburg* v. *Hayes*, 408 U.S. 665 (1972). In that decision the Court rules that journalists do *not* have a Constitutional right to withhold testimony—whether given in confidence or not—from a grand jury. Thus, it is clear that if a free flow of information is to be insured, action will have to be taken by the legislative branch.

Although the bill I have introduced (H.R. 2230) has 70 cosponsors in the House of Representatives, my efforts during the past several years have not been directed toward promoting my particular approach to the problem. Instead, I have attempted to inform people of the need for protective legislation of some sort.

As public and Congressional acceptance of the need for the shield concept continues to mount, the particulars of such legislation now assume greater significance.

There are some who argue that if an absolute bill is not enacted, none should be passed at all. I do not agree with that view, but I do share the concern on which it is premised. I would reiterate what I said to this Subcommittee in 1971:

"Ideally, the privilege should be as nearly absolute as possible, realizing that it must be reconciled with other worthy objectives."

In short, if legislation qualifications are too broad or too numerous, the bill will not fulfill the objective of promoting a free flow of information.

The Free Flow of Information Act I have introduced has one narrow exception to insure that libel laws are not emasculated. If a reporter is a defendant in a libel suit and bases his defense on the reliability of his source, he may not invoke the bill's protection. In addition, the bill contains a divestiture procedure which may be utilized in rare situations. Before the privilege may be divested, it must be shown "by clear and convincing evidence" that *all* of the following three factors are satisfied: "(1) there is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of the law; (2) the information sought cannot be obtained by alternative means; and (3) there is a compelling and overriding national interest in the information."

It is my view that H.R. 2230 provides broad, strong protection while accounting for possible competing interests which may occasionally arise. The standard for divestiture is the same standard advocated by the attorneys for the reporters in the *Branzburg* cases. Also, it is the traditional standard applied by the Supreme Court when first amendment interests are at stake and would have been applied in *Branzburg* had the minority prevailed.

Other bills have similarly narrow qualifications, and merit consideration. I cannot urge too strenuously that the Subcommittee scrutinize any exceptions in the bill it reports (if it decides to recommend any bill) to insure that they are both narrow and necessary.

The subpoena incidents which have occurred since *Branzburg* indicate that this problem can be remedied only by Congressional action. The Free Flow of Information Act and similar legislation are designed to insure that the American people receive the information they need to participate effectively in a society governed by elected representatives. I believe that the Senate and the House must act now to guarantee the people's right to know.

STATEMENT OF C. DICKERMAN WILLIAMS, JANUARY 11, 1973

It has never until the most recent times been suggested, and the Supreme Court has now denied, that a newspaperman had a constitutional privilege not to disclose confidential sources when properly called upon to testify about them. As far back as at least 1857 newspapermen have been compelled to give testimony respecting confidential sources, and by specific vote of the House of Representatives. Despite the absence of this privilege, prominent newspapermen have had confidential sources for many years.

A principal danger in enacting such a privilege is that, as court cases have demonstrated, sources supply misinformation either intentionally or through error, and newspapermen misquote their sources, again either intentionally or through error. It is a mistake therefore to assume that the public will necessarily receive correct information if such a privilege is provided. The danger of misinformation is obvious. The risk of protected misinformation appears particularly great in libel cases, including, in the light of the *Simonton* case (described in the following "Discussion"), group libel such as publications that "the House is corrupt." The *Simonton* case, involving generalized accusations against the House of Representatives, should be of particular interest to Congress.

Although articles on the subject would seem to imply that the situation had been brought to a head by efforts of the Nixon Administration to locate informants respecting bureaucratic misconduct, it is largely reporting of dissident groups who carry their dissent into crime, e.g., the drug "culture" and the Black Panthers, that has caused the present series of contempt prosecutions. Whether or not a privilege should be created to assure public information respecting these groups through confidential sources would seem to depend upon whether or not the public need for information so derived outweighs the risk of exposing the public to protected misinformation.

The flow of leaks from bureaucrats does not at present appear to be affected or involved in any substantial degree.

Any bill providing a privilege would presumably be referred to the Judiciary Committee, which might want to undertake the following:

1. Seek to identify the type of situation in which a privilege may be needed (e.g., dissident, criminal groups, such as the "drug culture", the Black Panthers, rioting convicts, and also bureaucrats, and whatever else).
2. Ascertain the relative need for such information as against the risk of protected misinformation because of fault by either the journalist or the source.
3. Limit any exemption Congress sees fit to grant to those particular areas in which it finds such need greater than the risk.
4. Exclude cases of libel and slander.
5. Condition any exemption it sees fit to grant on the existence of one or more of the conditions specified by Justice Stewart's dissenting opinion in the *Branzburg* case described under "Discussion".

6. Ascertain whether an adequate solution would be to enact as a statute the guidelines issued by the Department of Justice on September 2, 1970. These guidelines forbid subpoenas to the press when non-press sources are available and require the specific approval of the Attorney General for any subpoena to the press.

My own view, based upon a necessarily superficial study of the situation, is that:

1. A newspaperman probably deserves protection when be specifically identifies a misbehaving bureaucrat. If the newspaper says: "Joe Doaks at the Federal Housing Administration took a bribe to make a grant to the Goose Hollow Housing Authority," the prosecutor has enough information to investigate without knowing the source. (But Joe Doaks, if he sues for libel, should be entitled to know the source as it is an essential part of his case.)

2. I doubt if a newspaperman deserves protection when he makes a general accusation of misconduct. "There is a great deal of corruption at the Federal Housing Administration." Here, it seems to me, the public, the prosecutor and the honest people at the Federal Housing Administration are entitled to have the reporter give whatever information he may have so that the culprits can be tracked down.

3. The extent of the protection to be given reporting on dissident, criminal groups would seem to require careful study. I do not think that people who have blown up a building, killing one or more people, are entitled to protection when they give information to a reporter confidentially. (This was the situation in a Wisconsin case.)

DISCUSSION

In *Branzburg* v. *Hayes*, 40 U.S. Law Week 5025 (1972), the Supreme Court in a majority opinion written by Justice White held that a newspaper reporter had no exemption from the duty of the ordinary citizen to give testimony before grand juries. ("*Branzburg* v. *Hayes*" is the title given by the Court to three cases disposed of by a single opinion.)

The Court opinion emphasized that publishers had no special immunity from general laws (tax, anti-trust, labor relations), are subject to libel laws and punishment for contempt of court, and have no special right of access to information; that not until 1897 had any newspaperman claimed any such exemption on any ground; that the courts had invariably denied such exemption; that not until 1958 had any newspapermen ever claimed such exemption on first amendment grounds (when the claim was denied); and that it was not until 1969 that any court had recognized such a claim. The Court then referred to the broad and general investigatory powers of grand juries and to the condemnation by eminent authorities of exemptions from the duty to give evidence. In this respect the Court cited authority for the proposition that the purpose of a grand jury was to find out if a crime had been committed and, if so, who did it. Hence its investigatory powers must be broad.

The Court next noted that when newspapermen engaged in criminal conduct, they were subject to prosecution, and referred to the statute enacted by the First Congress forbidding failure to disclose evidence of crime to proper authorities.

The Court rejected the suggestion that the Government make a demonstration of a "compelling need" as a prerequisite for enforcement of such a subpoena.

The Court noted that the grand juries were subject to judicial control and that the particular court in control of a grand jury inquiring of a newspaperman would be able to prevent unwarranted harassment.

The dissenting opinion of Justice Stewart, concurred in by Justices Brennan and Marshall, did not challenge the fundamental precedents relied on by the majority, nor did it conclude that any absolute exemption was required by the first amendment. The dissenting opinion did, however, conclude that news gathering was protected at least to some extent by the first amendment, and that hence, as a prerequisite of an examination of a newspaperman as to confidential sources, the Government must "(1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law: (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of first amendment rights; and (3) demonstrate a compelling and overriding interest in the information."

Justice Douglas wrote a separate dissenting opinion arguing that the first amendment required an absolute exemption.

Thus, it appears that the issue between the majority and the principal dissenting opinion appears to be whether the newspaperman must first appear and then, if he can show harassment, seek appropriate relief, or whether the Government must first show that there is a "compelling need' for the newspaperman's evidence to show proof of a "specific probable violation of the law."

The majority's objection to the standard proposed by the dissent is that it would "embark the judiciary on a long and uncertain journey to . . . an uncertain destination." ". . . [T]he courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate has been laid . . . [T]he courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws."

The Supreme Court having decided that the Constitution provides no exemption, the question becomes one of policy for Congress. The issue would appear to be whether such deprivation of news from confidential sources as the press might suffer by reason of the existence of the duty outweighs the evils that the Government and civil litigants would suffer by reason of the proposed exemption, and that people in public life would suffer through the exposure to the publication of false information either because the journalist twisted valid information or was supplied with false information.

We have had the first amendment since 1791. We have also had a vigorous and contentious press. We have also had "leaks" for many decades. Some reporters, indeed, have specialized in "leaks" and have flourished. The fact that some reporters publish leaks from the bureaucracy with great regularity would seem to suggest that Justice Stewart's fears are not valid. The information which was involved in the *Branzburg* cases did not involve disclosures of bureaucratic wrongdoing, but rather of crime (in the first case, drug violations; in the second, civil disorder perhaps caused by Black Panthers; in the third, Black Panther plots to commit crimes of violence for political purposes). The journalists in these cases did submit affidavits that the flow of information from the drug culture and the Black Panthers would cease if they were required to reveal their sources. The Government claimed, on the other hand, that the Black Panthers continuously sought publicity.

In the dissenting opinion reference is made to various memoirs and biographies of journalists citing the need for and importance of confidential sources, viz., those of Messrs. Maclean, Pearson, Larsen, Abbott, Krock and Sulzberger. It is not suggested by the dissenting opinion that these memoirs or biographies said that an exemption from the duty to testify was essential to the maintenance of these sources.

The *New York Times* of January 7, 1973, ran a round-up on recent contempt sentences against reporters. None of these cases involved refusal to disclose confidential sources in the federal bureaucracy. Two (*Farr* and *Wood*) involved reporting of court proceedings in violation of a court order; one (*Bridge*) related to an allegation by a city official of Newark, N.J. that he had been offered a bribe; two (*Dan* and *Barnes*) involved observations by permission of the inmates at the Attica prison riot; and one (*Weiler*) related to conditions in a Tennessee hospital. In addition it was noted that after one reporter had testified as to his observations at a meeting of Students for a Democratic Society, a student at a campus disorder refused to talk to him.

On the record to date there appears little evidence that leaks from the bureaucracy would be impaired, but there are allegations which may be plausible that groups involved in crime would not be disposed to talk to reporters if those reporters could be compelled to disclose their sources. In the three *Branzburg* cases, it appeared in two of them that the journalist had acquired knowledge of the commission, or plans for the commission, of specific crimes.

Turning now to the disadvantages of the proposed exemption:

In a case occurring in 1857 it appeared that one J.W. Simonton, Washington correspondent of the *New York Times*, had reported that members of the House of Representatives were willing to accept bribes to vote as might be desired on then-pending bills. The House appointed a "select committee" to investigate this accusation of corruption. Called before this committee, Simonton testified that two members of the House had told him they would vote on proposed legislation as desired for a bribe of $1,500 a bill. He then was asked "who these members are?"

He replied: "I cannot without a violation of confidence than which I would rather suffer anything . . . I do not see how I can answer it without a dishonorable breach of confidence."

The select committee reported this colloquy to the full House and introduced a resolution that Simonton be cited for contempt. In the debate on January 21, 1857 on the resolution, members of the House made remarks as follows:

"This is a strange sort of confidence. He says confidence was reposed in him, and that he cannot break the seal of that confidence. Yet it was not confidential enough to keep him from publishing the facts to the world, in this way casting suspicion on every man in this House . . . I have a right to know [who made the proposition]; the House has a right to know; my constituents have a right to know; the constituents of every member here have a right to know . . ."

A reporter has ". . . a duty in law and morals higher than any pledge given advisedly or unadvisedly."

"[W]hen great public interests are involved he is bound to make revelation—no matter how sacred the confidence which may have been reposed in him."

No member suggested the existence of a first amendment privilege, but some members opposed the resolution on the ground that Congress did not have the constitutional powers to compel testimony.

The resolution was adopted overwhelmingly. When brought before the House, Simonton's defense was not the first amendment, but the absence of any law compelling him to testify. He said:

"You have not on your statute books any law forbidding that confidence . . . *Make such a law, and I will observe it.* Make such a law, and when Mr. A or Mr. B comes to me, and wishes to make a confidential communication, I will say to him: 'Yes, I will receive it, subject always to the provisions of this law.'"

A large majority voted that Simonton was in contempt of the House and should be confined until he testified, as he eventually did. Cong. Globe, 34th Cong. 3d Session. 403–406. 3 Hinds, *Precedents*, § 1669.

It certainly wiould seem that the houses of Congress should continue to be able to protect themselves as was done in 1857.

At least one member of Congress has suffered defamation from a publisher who misquoted his sources. In the libel suit brought by Senator Goldwater against Ralph Guinzburg, publisher of Fact magazine, pre-trial depositions established that the article on Senator Goldwater, published by Fact, had substantially misstated the results of a survey of psychiatrists taken by questionnaire. *Goldwater* v. *Guinzburg*, 414 F. 2d 324 (C.A. 2d, 1969). It was not argued in this case that the sources were confidential, but the fact that the publisher misquoted his sources shows that it cannot be assumed that to deny an exemption would invariably cut off truthful news; a duty to reveal his source would presumably have the effect of making a publisher more careful to quote his sources correctly.

In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), the Supreme Court sustained a libel verdict resulting from the publication of an article in the *Saturday Evening Post*. It developed that the *Post* had defamed the plaintiff football coach on the basis of false information provided by a convict then on criminal probation, i.e., a man of highly dubious character. In this case the untrustworthy nature of the source could only be shown by identifying the source.

Again, in various cases it has developed that information is made use of, although not necessarily published, when the slightest investigation would have disclosed its falsity. Such a case was *Pecue* v. *West*, 233 N.Y. 316 (1922), in which the defendant superintendent of a morals group transmitted to a district attorney information in an anonymous letter that the plaintiff kept a brothel. The slightest investigation would have disclosed that she was a respectable housewife. The defendant was not, of course, a newspaper, but the incident demonstrates that presumably responsible people make use of information the falsity of which could be readily ascertained.

Under the doctrine of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and succeeding cases, the plaintiff in a libel action who is a public official or public figure must prove not only that the publication was false, but also that the defendant knew it to be false or acted in reckless disregard of the truth. The assumption of this burden necessarily involves asking the defendant what his sources were. If the defendant publisher can merely say that his sources are confidential, the defamed plaintiff can never recover, although, as the foregoing cases show, publishers do misquote and sources lie.

Turning to the situation existing in the cases before the Supreme Court, viz., cases involving efforts to extract testimony from reporters who knew, or purported to know, of the commission of various crimes: The Supreme Court overruled the claim of exemption on the ground that, "Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the first amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not."

Insofar as a statute is concerned, the question of course is one of policy.

To what extent an exemption would be beneficial in providing additional facilities for news gathering as against the harm of additional protection for criminals is difficult to say. At the time of the Supreme Court decision 17 states, including New York, had enacted legislation providing some kind of exemption. The Committee of the Senate that considers any bill providing an exemption (presumably the Committee on the Judiciary) might well look into the experience of the states with such legislation. The New York statute took effect less than three years ago (May 13, 1970), and hence our experience here in New York is limited. The court cases to date indicate a narrow construction. In *Matter of WBAI-FM*, 68 Misc. 2d 355 (Albany Cnty. Ct. Nov. 1971), the Court said:

"Although liberal interpretation of pertinent statutes might well be deemed desirable in passing upon civil rights as such, laws, even in this category, cannot be distorted through breadth of interpretation to the point of impairing the orderly process of investigation of crime and prosecution of criminals."

Of course if this construction is sustained by the higher courts exemption legislation will not be a serious handicap. On the other hand, if such legislation were construed to exempt newspapermen under the conditions existing in *State* v. *Knops*, 49 Misc. 2d 647 (1971), the effects might be serious. There a grand jury was investigating the bombing of Sterling Hall at the University of Wisconsin. A newspaper, *The Kaleidoscope*, published an article "The Bombers Tell Why and What Next". Overruling the claim of privilege, the Court said: "The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks."

The real issue in cases of this type seems to be whether it is sufficiently important for society to acquire about dissident criminal groups such additional information as it can through a journalist's privilege to warrant exposing itself to irremediably false information or propaganda either by reason of misquotation of sources by journalists, either consciously or by error, or by the supply of false information to journalists by dissidents and criminals.

In an attempt to compromise with the press the Department of Justice on September 2, 1970 issued guidelines respecting subpoenas to the press. These guidelines require that any subpoena to the press be specifically approved by the Attorney-General, that press sources not be used if non-press sources are available, that prosecuting attorneys negotiate with the press, and that weight be given to whatever first amendment interests may be involved.

STATEMENT OF WRITERS GUILD OF AMERICA, EAST, INC.

The Council of the Writers Guild of America, East, on February 28, 1973, passed the following resolution:

The Guild is gravely concerned at the growing threat to freedom of the press within this democracy.

Too many newspeople have been jailed for practicing the freedom of the press; for protecting their sources; for refusing to tell courts details of information gathered (but not used) while working as journalists.

We find this practice directly contrary to the best interests of a free people. For we believe that if newspeople are truly to be trustees of the people's right to know, rather than real or apparent agents of government, then they must be absolutely free to report news, information and opinions without any interference from any other section of the community. This belief is based on the assumption that the First Amendment was written to protect the people and their democratic right to free, untainted information.

To that end, the Guild calls on Congress to speedily pass legislation providing absolute immunity for newspeople against forced disclosure of sources or unused information gathered during the practice of their profession. The Guild supports those newspeople who are currently fighting to protect their rights under the First Amendment and believes with Thomas Jefferson that "our liberty depends on the freedom of the press, and that cannot be limited without being lost."

NEWSPAPER AND MAGAZINE ARTICLES

[From the *National Observer*, Dec. 30, 1972]

PRESSURE ON THE PRESS ALARMS NEWSMEN

REPORTERS GO TO JAIL IN A GROWING BATTLE OVER CONFIDENTIALITY OF NEWS

(By Mark R. Arnold)

Press freedom is under attack—as usual. But this time the issue isn't bias but confidentiality.

Armed with recent Supreme Court decisions, some lower courts, grand juries, and state legislatures are demanding that reporters divulge confidential sources or go to jail.

The severity of the threat to press freedom is a matter of dispute. But the nation's leading news organizations, normally distrustful of Government, are calling for Federal legislation in the new Congress to protect "the public's right to know."

Some publications and some newsmen are disturbed by the thought of legislation that would spell out rights guaranteed by the Constitution. Columnist I. F. Stone, for example, wonders whether "in trying to reinforce our rights we might actually undermine them; the details are the important thing." There's controversy, too, over whether scholars and authors should be covered by any new protection offered newsmen.

But regardless of differences over the need for legislation, many newsmen, publishers, and broadcast executives contend that the press has lately become a scapegoat for vindictive judges and government authorities seeking to cover their own mistakes. Items:

Reporter Peter Bridge of the defunct *Newark News* spent 21 days in jail in October for refusing to tell a county grand jury whether he knew more than he printed about a local housing official's charge she was offered a bribe.

Newsman William Farr has been imprisoned since Nov. 27 for refusing to tell a Los Angeles Superior Court judge which of six attorneys in the Charles Manson murder trial gave him incriminating information he published in the *Herald-Examiner* in violation of the judge's publicity-gag order.

Reporter Joseph Weiler of the *Memphis Commercial Appeal* was threatened with a contempt hearing by a Tennessee state Senate committee after he refused to disclose his sources for a series of articles on inmate abuse at a state hospital for the retarded. A radio newsman, Joe Pennington, who did disclose his source for a similar report, was recommended for a grand jury investigation of perjury when the source denied giving him information.

David Lightman, a reporter for the *Baltimore Evening Sun*, has been cited for contempt of court in refusing to tell a county grand jury the identity of an Ocean City, Md., salesgirl who was described in an article he wrote on drug traffic as having offered him illicit drugs. His state appeals have been exhausted and he will go to jail, unless the Supreme Court takes the case and rules in his favor.

Brit Hume, an associate of columnist Jack Anderson, has been ordered in a libel case to divulge his source for an article charging that a United Mine Workers official had illegally removed union files. This ruling is also on appeal.

Jim Mitchell, a reporter for radio station KFWB in Los Angeles, was ordered by a county grand jury Dec. 20 to produce tapes and notes used for a report on bailbond practices, which the grand jury is investigating. His station manager said the request for materials not broadcast raises serious Constitutional questions.

John F. Lawrence, Washington bureau chief of the *Los Angeles Times*, was jailed briefly Dec. 19 for refusing to honor a court order in the Watergate bugging case. He had been ordered to produce tapes of a five-hour interview by two *Times* reporters with Alfred C. Baldwin III, a key Government witness, but he contended it would violate Baldwin's confidence to do so. The interview had been granted on the understanding that Baldwin would decide which portions could be published. A major court test was averted two days later when Baldwin released the *Times* from its pledge of confidentiality. Lawrence thereupon supplied the tapes to the court.

Lawrence also got Government attention during the "steel crisis" of 1962; the Kennedy Administration sent the FBI to his home in the middle of the night to demand information about a story he wrote. Lawrence refused to give it.

The frequency of these challenges to news-gathering efforts has prompted fears that a new judical "reign of terror" may be descending on the mass media. Its object: to stifle dissent and journalistic initiative. For while it is true that newsmen have always risked jail sentences for refusing to name sources or the contents of unpublished interviews, it is only in the past four years that many courts have begun to demand that they make the choice.

More than 150 subpoenas were served on newspapers and radio-television stations in the first two years of the Nixon Administration by Federal prosecutors, state prosecutors, and defense attorneys. There is no count on the number since then but two trends are clear: Federal subpoenas are down sharply, as a result of new press-subpoena guidelines issued by the Justice Department in 1970. But state and local subpoenas are up sharply.

Those seeking to explain why point to two recent Supreme Court decisions that many newsmen feel are chipping away at the Constitutional underpinnings of press freedom.

In the Pentagon Papers case two years ago, the Court for the first time enjoined newspapers from publishing information the Government wanted suppressed, albeit only temporarily. And in the *Caldwell* case last June, in which a *New York Times* reporter was held in contempt for refusing to answer grand jury questions about the Black Panthers, the Court held 5 to 4 that reporters have no automatic right to refuse to divulge information learned in confidence. The Court also said, however, that the states and Congress may create a newsman's privilege by legislation, if they see fit.

The debate over confidentiality unites newsmen, divides law-enforcement authorities, and frequently mystifies, the public. Its springboard is the first amendment to the Constitution, which declares that Congress "shall make no law abridging freedom of the press." But the Constitution doesn't define freedom of the press, and though the amendment would seem to safeguard the right to publish the news, it doesn't extend the same blanket protection to the right to gather the news, unless by implication.

Many citizens do not understand why the press should refuse to co-operate with law-enforcement authorities who might, say, want to study unpublished news photographs of a ghetto riot to determine who the instigators are. Why, they ask, should reporters refuse to tell authorities whether any illegal acts might have been discussed at meetings of political radicals that they attended? Some even ask why the press should publish information from people who "won't own up" by letting their names be used in print?

A NEED FOR INSIDE SOURCES

The best defense of the prevailing press practices was the one given by Senator Alan Cranston of California, before a House Judiciary subcommittee last October. Said he:

"When public or private power is abused, it is often abused secretly. And as a police department often must depend on a tip to solve a crime, so investigative reporters often must depend on a knowledgeable, inside informant to discover abuses of power." The more so, says Cranston, since reporters don't have access to subpoenas, arrest powers, and the other tools in a lawman's work kit.

If reporters can't guarantee protection, argues Cranston, sources of information will dry up, wrongdoing won't be exposed, the public will be denied essential information. Bill Small, CBS news director in Washington, tells this story about the effects of the *Caldwell* case on newsgathering practices:

CBS wanted to interview a "cheating" welfare mother in Atlanta for a network White Paper on public assistance. Producer Ike Kleinerman agreed to disguise her voice and appearance. But the woman, fearing prosecution, demanded a pledge that the network not divulge her name if subpoenaed to do so. Kleinerman called CBS' legal counsel in New York and was told the network couldn't guarantee to protect the woman's identity. The interview was canceled.

In Memphis, the *Commercial Appeal* received a tip that 11 hospital employes had been fired or suspended for abusing inmates at the state hospital for the retarded. Reporter Joe Weiler was assigned to the story. He investigated, confirmed the facts with hospital authorities, and wrote the story.

A state Senate committee undertook an immediate investigation of the incident and zeroed in—not on conditions at the hospital but on reporters Weiler and Joe Pennington of radio station WREC, who broadcast a similar account of conditions. Several senators tried to stop the investigation, but the chairman, according to state senator Curtis Person, Jr., "wanted to see the newspapers sweat."

THE EFFECTS LINGER

Last week the contempt hearing against Weiler was canceled when the Tennessee attorney general ruled the lame-duck committee lacked authority to hold it. But the affair has cast a pall over news-gathering activities.

Says Angus McEachran, assistant managing editor of the *Commercial Appeal:* "If another case arose I'd find it very difficult to believe somebody would pick up the phone and call us about it."

Eighteen states (Tennessee isn't one of them) have laws protecting the confidentiality of newsmen's sources. But those laws are now being disparaged as inadequate. California, Maryland, and New Jersey all have strong shield laws, and reporters in all three states are serving or threatened with prison terms because of loopholes in the law or unusual court interpretations.

New Jersey courts ruled that Bridge wasn't entitled to protection as to the contents of his interview since he named his source in the story—the woman who said she was offered a bribe. He was charged with contempt. Farr was charged during a brief period when he left the newspaper business to take a job as executive assistant to the Los Angeles district attorney; Superior Court Judge Charles H. Older ruled that the law didn't cover "former" newsmen. Farr is now serving an indefinite sentence for civil contempt.

Lightman was not protected by the Maryland law—oldest in the nation—because he neglected to identify himself as a newsman to the salesgirl when asking about drugs. His newspaper, which is appealing the case to the Supreme Court, says he didn't purchase any drugs and was there in his capacity as a reporter, not a private citizen.

Accordingly, many media representatives are demanding Federal legislation to protect newsmen's sources. But the major news organizations are at odds over the 28 bills that were introduced in the last Congress, and some publications oppose any legislation. Lawmakers, too, are divided, though few congressional opponents of protection are willing to speak for publication.

Last July, following the *Caldwell* decision, five major news organizations calling themselves the Joint Media Committee drafted a bill providing a "qualified" newsman's source protection privilge. Titled a "Free Flow of Information Act" and introduced by Rep. Charles Whalen, Ohio Republican, in the House and, in modified form, by Sen. Walter Mondale, Minnesota Democrat, in the Senate, it placed the burden of demonstrating the need for any subpoena upon the parties seeking it.

Anyone employed or "otherwise associated" with a publication, news service, or radio or television station could not be compelled to identify confidential sources or produce unpublished information unless a Federal court determined that three conditions had been met: There is evidence the protected person has information of a law violation, there is no alternate means of obtaining the information, and there is a "compelling and overriding national interest" in the information or source.

The Joint Media Committee is no longer joined on a common bill. In a statement Dec. 11, the committee said recent "events have added new emphasis to the need for legislative relief," and cited the *Bridge* and *Farr* cases as evidence of "continuing abuses of the first amendment."

Now the American Society of Newspaper Editors, one of the committee members, has embraced a stronger "absolute" privilege against divulgence of sources; two others, the Associated Press Managing Editors and the National Press Photographers Association, support the original qualified privilege; and the remaining two organizations, Sigma Delta Chi, the national journalism society, and the Radio-Television News Directors Association, have embraced a middle position. Meeting in convention in November, these two groups endorsed an absolute privilege as an ultimate goal but urged their officers to work for "the best possible legislation" in the new Congress—i.e., a qualified privilege.

Absolute privilege bills, introduced in the last Congress by Senator Cranston and Rep. Jerome Waldie, also of California, provide that no news medium employe can be forced to divulge information that violates a professional confidence even in cases of national security. (He can, of course, supply it voluntarily.) Senator Cranston defends his bill by quoting Harvard Law Prof. Paul Freund, who said: "It is impossible to write a qualified newsman's privilege. Any qualification creates loopholes which will destroy the privilege."

The Senate Judiciary Subcommittee on Constitutional Rights will hold hearings early in the new session on proposals to protect newsmen's sources. Chairman Sam Ervin of North Carolina, the Senate's leading constitutional lawyer, "is inclined to support some sort of qualified privilege," committee aides say.

But some lawmakers are skeptical of the wisdom of the legislation, though none has publicly voiced objections so far. "I frankly haven't made up my mind," says one Western House Democrat, "but I don't aim to say a word against it till I'm sure; you know, we fellas up here live or die by our press notices back home."

STATE OR FEDERAL ACTION?

The Nixon Administration is ambivalent toward granting protection to newsmen. Herb Klein, President Nixon's communications director, emphasized in an interview with The National Observer that he thinks newsmen "have a need for confidentiality," but he argues that corrective action should be sought "where the problem arises—in the states," through new or tighter protective legislation.

On the other hand, the Administration "does not oppose" the idea of a Federal qualified-privilege law; "we just think it's a mistake to rush in with a Federal shield law" before all the ramifications have been carefully explored, Klein says. The White House, too, has to think of its press notices.

In a letter to the American Society of Newspaper Editors in November, President Nixon said that the press has managed to function for almost 200 years without "resort to Federal legislation," and called for enactment of a newsmen's "shield" law in all states. He noted that the Federal Government has subpoenaed newsmen in only 13 cases since the Attorney General issued strict press-subpoena guidelines in August 1970.

Those guidelines, aimed at curbing the tendency of prosecutors to use the press as an investigative arm of the Government, now require that the Attorney General personally approve all Government requests for subpoenas of newsmen. The criteria to be used are identical to those in the qualified-privilege bills.

Guardians of press freedom, such as Jack Landau of the Reporters' Committee on Freedom of the Press, conceded the guidelines have worked well (as press spokesman for former Attorney General John Mitchell, Landau helped draft the guidelines). But, argues Landau: "What Justice unilaterally imposes, it can unilaterally withdraw." The only secure safeguard of the public's right of information is a Federal shield law, he argues.

A few news publications disagree. Among them: the conservative Manchester, N.H., *Union-Leader*, the liberal *New Republic* Magazine, the *Daily Times Leader* in West Point, Miss., the *Evening Sentinel* in Ansonia, Conn., the Nowata, Okla., *Daily Star*. Critics of legislation argue that bills enacted to protect a right can be amended to restrict it, and that no rights should be enjoyed by the institutionalized media that are not extended to the smallest pamphleteer with a mimeograph machine.

"The threat to freedom of the press is not nearly so great as the power of the press," said the Raleigh, N.C., *News and Observer* in a recent editorial." "And the basis for the press' power could be compromised by giving reporters special legal rights and protection [Such protection] could make its freedom and power seem special privilege."

Proponents of legislation, of course, insist that it's not the newsman's right to his source but the public's right to the news that they seek to protect. A recent Gallup Poll found that 57 percent of Americans believe that newsmen should not be compelled to reveal confidential sources. But the respondents were not asked whether they favored Federal legislation.

Peter Bridge is leading a personal crusade for legislation. "If we can't protect our sources, we'll have only Government press releases," he says. New York's Governor Nelson Rockefeller is one public official who agrees, though he, like President Nixon, prefers passage of tighter state shield laws.

Rockefeller told an Anti-Defamation League dinner in Syracuse last month that reading about one's failings in the daily papers "is one of the privileges of high office." He added:

"I would far prefer a society where a free press occasionally upsets a public official to a society where public officials could ever upset freedom of the press."

[From the *Boston Globe*, Jan. 27, 1973]

THE CASE FOR A SHIELD LAW

The Bill of Rights was written into the Constitution in 1791 to protect the rights of the people, not of any special group or the government, against any encroachment by government. It is most important to keep this in mind.

For it has been asserted that in seeking a privilege of immunity under the first amendment, the press is guilty of elitism, of wanting, as one writer has put it, to "be set apart as a privileged caste exempt from the obligations of lesser folk."

This is the same note struck by U.S. Supreme Court Justice Byron White in his *Caldwell* ruling that "newsmen are not exempt from the normal duty . . ." and that they want "a testimonial privilege that other citizens do not enjoy . . ."

Such words hide the fact that, as usual, it is the people themselves who are being cheated of their right to know.

The first amendment was written to protect the people's freedom to worship, freedom of speech, freedom of the press, and the right to assemble peaceably and "to petition the government for a redress of grievances." The very sequence is significant: free speech for all, and a free press so everyone could exercise free speech with knowledge.

It was known that some newspapers would print error. This has always been so. But it was also known that error can only be corrected if there is freedom for the truth to find its way. A free press does not mean, cannot mean, a press that is all good, but a press in which the good has more than a fighting chance to correct the bad.

In his very first case after being sworn in, U.S. District Court Judge Murray Gurfein summed it up in his 1971 Pentagon Papers ruling: "A cantankerous press, an obstinate press, an ubiquitous press, must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know . . ."

Newspapers enjoy no special exemption from the laws of the land. They can be, have been and should be held accountable in court for what they publish. And they are also accountable to their readers, who should know better than anyone in government what to do about an elitist newspaper.

Unlike government, the press has no subpoena power. It must depend for much and sometimes the most important of its news on its sources. Ever since the Caldwell decision of last June, a lot of those sources have been drying up. This has happened, quite literally and specifically, to sources of *The Globe's* Spotlight Team, which before *Caldwell* won a Pulitzer Prize for exposing corruption.

We state quite frankly, that if some of this team's sources were publicly identified, human lives would be in jeopardy. And also, there would be in the end no more exposure of governmental corruption. The people would be shafted more and more.

Far from being elitist, editors and reporters have to take a lot of pressure. They take a risk, small or large, every time they print a story. They get a lot of criticism, sometimes deserved, from public officials, community figures, readers. And now they are taking it from the courts and prosecutors.

The result is what the lawyers call "a chilling effect." Stories with elements of risk tend to be avoided. Editors can still go home and sleep soundly, perhaps—but in the end it is the public that is cheated.

Perhaps Paul Branzburg summed it up best when he said on a recent TV show, "I've heard of a lot of governments that took over the press, but I never heard of a press that took over the government."

The people's access to information is gravely endangered today, and there now seems small likelihood of the U.S. Supreme Court's reversing *Caldwell*. The only possible solution of the problem lies in the enactment of Federal and state shield laws, which the high court explicity invited if the Congress and states so wish.

They very much ought to. Yet the search for an adequate law will not be easy. Already the courts have shot holes in a number of the 18 state laws on the subject, since all but two of them protect newsmen only from disclosure of a "source" of information. Only two states protect the information itself.

The official historian of the U.S. Supreme Court itself, Prof. Paul Freund of the Harvard Law School, has summed up the matter: "It is impossible to write a qualified newsman's privilege. Any qualification creates loopholes which will destroy the privilege."

For this very reason, the American Newspaper Publishers Assn., the American Society of Newspaper Editors and the American Newspaper Guild all favor an absolute guarantee. So, we think, do the American people.

A Gallup poll last Dec. 3 said the view that a newsman should not be required in court to reveal confidential sources was supported by 57 percent to 34 percent The percentage in favor ranged from 48 for those with only a grade school education to 68 for those with a college background. And such public figures as Governors Rockefeller of New York and Reagan of California have come out for a strong shield law.

Framing the best possible law will not be easy. But *The Globe* strongly believes that the law's protection should be absolute and not qualified, both as to the identity of sources, the information gained from them, and as to the entire field of the printed and electronic word. There should be no elitism in the free flow of ideas and facts.

Nor should the college and so-called underground press be excluded from the privilege. They probably need it even more than the established or commercial press. (In 1970–71 some 60 college newspapers were censored; the Internal Revenue Service probed the tax exempt status of the *Columbia Daily Spectator* to the point where its continued existence is threatened, and in Palo Alto the police raided the *Stanford Daily* looking for photos so they could make arrests.)

An all-inclusive, national shield law is vital to protect not merely the newspaperman's rights, but the public's right to the open kind of knowledge and information it needs.

For without it, a long-suffering people, deprived of this basic liberty, will have to make its decisions on public affairs under orders, or in the dark, while those in the seat of power rob them blind.

[From the *Washington Post*, Mar. 18, 1973]

THE PRESS CAN DEFEND ITS OWN FREEDOM

(By Kenneth Crawford)

The American Society of Newspaper Editors has now made it more or less official: the country's journalistic establishment wants Congress to give the press unqualified immunity from disclosure of its confidential sources of information under compulsion of the subpoena power of the courts. Not all journalists agree with the position of the ASNE, but it appears that a majority of them does.

A dissenting minority, as well as the majority, has been permitted to make its case in hearings now being conducted by a Senate committee on various shield bills, some to grant limited immunity, others to go all the way.

Since Congress almost certainly will not pass any of these bills and President Nixon stands ready to veto any measure it does pass, the argument is largely academic. It nevertheless has educational value, the relationship between government and the fourth estate being as little understood as it is both by Congress and the public. Even the courts seem a little hazy about it.

To some of us who have been in this business for a long time the minority has the more persuasive position, perhaps because age makes us resistant to change but perhaps, too, because we detect dangers in any attempt to define freedom of the press as guaranteed by the first amendment to the Constitution. Special favors granted us by Congress today could become disfavors tomorrow. Any law passed by this Congress could be amended to reverse its thrust by some future Congress.

Not only Congress but state legislatures across the country are under seige of demands for press shields. Some of them have already complied. Some of the bills under consideration by Congress would extend press immunity to state as well as federal jurisdictions.

The reason for this seige is that the courts have recently issued scores of subpoenas calling upon journalists to testify before grand juries and in criminal and even in civil cases, identifying their sources of information and producing unpublished notes, films and recordings. Several reporters have been jailed for contempt for refusing to comp.ly.

In one such case, the U.S. Supreme Court has upheld the right of a lower court to jail a *New York Times* reporter for non-compliance. The decision was a close thing, 5 to 4, and more tative than final. Close observers of the court believe that this was not its last word—that it might go the other way in another case presenting a somewhat different set of facts.

In the background of all this, and perhaps more important than the foreground, is the widely held assumption that the Nixon Administration is so hostile to the press that press freedom needs more protection than in the past. There is nothing new about the subpoenaing of reporters or about their punishment for contempt. It has all happened before but not with such frequency as it has since the Nixon administration came to power. So the administration is blamed whether it should be or not.

Another new element is television. Although it operates under federal license, it rightly claims the same freedom to disseminate news and opinion as does the print press. Licensing makes it vulnerable and therefore especially sensitive. If anything, its spokesman want shielding even more than representatives of the older media do.

The advent of television has had an indirect effect on the other media, too. To compete with its animated capsulization of the news, publications dealing with current events have emphasized reporting in depth and investigation of social phenomena—drugs, crime, minority unrest, underground protest, and all the rest. In this kind of reporting, the facts are sometimes reachable only through sources that insist upon protection from exposure.

Even the members of Congress who are most enthusiastic about press shielding concede the difficulty of writing an effective law. Whether protection should be limited or unlimited is still under discussion, though the drift seems to be toward total immunity. Then there is the problem of deciding who is to be protected. Who is a journalist and who isn't. Reporters for the *New York Times* and The *Washington Post* obviously are, but what about the man who mimeographs and distributes an underground scandal sheet?

Is anybody who claims to be a journalist to be granted immunity from testifying about a crime he has witnessed? If not, where is the line to be drawn? Journalists are not professionals in the sense that doctors and lawyers are. Their relations with sources are not the same as those of doctors to patient or lawyer to client. Journalists have always resisted any kind of licensing and will continue to do so.

Until now, the courts have applied the first amendment case by case and the results, while sometimes unpleasant to the press, have not been disastrous. The American press is still the freest and probably the best in the world at its primary job of informing the public. Granting that it is facing new difficulties, it is fully capable of defending its freedoms in the future as it has in the past.

In any case, the ASNE and its allies will probably be saved from themselves at least for the duration of the present congress and administration.

[From the *Columbia Journalism Review*, Sept./Oct. 1972]

BEYOND THE "CALDWELL" DECISION:—JUSTICE WHITE AND REPORTER CALDWELL: FINDING A COMMON GROUND

(By Fred W. Friendly)

The trouble with most practicing journalists is that they read books about everything except journalism (most journalism books are usually practical works designed for students). As a result journalists have little sense of the history of their profession. They deal in absolutes, making a dazzling leap from John Peter Zenger and the Alien and Sedition Acts to the Pentagon Papers and the *New York Times'* reporter Earl Caldwell, treating the intervening two centuries as though they had produced only a series of self-serving court decisions upholding the freedoms and privileges of the press. Consequently, journalists often hold too simplistic a view of courts and the legal process.

Earl Caldwell was probably justified in resisting those grand jury fishing expeditions into his Black Panther interviews, despite the recent Supreme Court decision against him. CBS president Frank Stanton was also justified in refusing to permit Congressional investigators to fish in the outtakes of "The

Selling of the Pentagon." For what it is worth, I stand with the dissent of Justice Stewart in the *Caldwell* case, particularly his reference to the "court's crabbed view of the first amendment, [and] insensitivity to the critical role of an independent press."

These are complex and specific reasons for resisting raids like those against Caldwell and CBS. But all subpoenas can't be dismissed simply with shibboleths and slogans about journalistic codes, reporters' shields, and the divine immunity of the news media against any and all such writs. Indeed, subpoenas are *not* always equivalent to dirty words, and every journalist who resists a Congressional or grand jury request for information is not always a crusader carrying the shield of James Madison or the sword of Lincoln Steffens. Journalists should know that the people's right to know and the subpoena are not necessarily antithetical. When I recently expressed such sentiments in the presence of a distinguished American newspaper editor, his outrage was expressed in disbelief and shock that "one who had supped at journalism's table" should utter such heresy.

"What about the Memorial Day Massacre film?" I asked.

"What film? What massacre?"

I explained that the Memorial Day Massacre footage was one of the most sensational pieces of film of the newsreel age—a documented story of omission. "If you permit me to tell you about the background and about the resulting confrontation, I'll bet a bottle of scotch I can make you come out favoring the use of the subpoena."

The editor replied, "I don't care what the set of circumstances was, you could never justify the use of a subpoena against a news organization . . . but try me anyway."

The story of the Memorial Day Massacre is most graphically told with use of the film itself. I relate it here as I did at that dinner party last winter—without benefit of the five-minute film. But every newsroom and journalism or law class that can beg, borrow, or purchase the footage ought to make it required viewing.

In the spring of 1937, the CIO steelworkers union was locked in a bitter strike against the Republic Steel Corp. Earlier that year, the steel union and the giant U.S. Steel Corp. had made their peace, and the steelworkers union was now applying pressure to organized "Little Steel." Tom Girdler, the unreconstructed chairman of Republic, was determined to shatter the strike—and the CIO—by invoking all known strikebreaking methods. Most of the press, with the single exception of the *Christian Science Monitor*, were hostile to the strike. Arthur Krock of the *New York Times* likened CIO picketing in those days to banditry.

On Sunday, May 30, 1937, 1,500 to 2,000 men, women, and a few children faced more than 200 Chicago and private police across a broad field adjacent to the plant on Burley Avenue near 117th Street. The police report of the day indicated that the "crowd must have consisted largely of agitators, outsiders, and malcontents because it was unthinkable that the average working man would act as the marchers had." Shortly after 4 p.m. there was a brief scuffle and a flurry of excitement. Some shots were fired, some rocks were thrown, and when it was over, ten strikers were dead, thirty persons were seriously wounded, and thirty-one others, including three policemen, were hospitalized. Another thirty-five policemen were injured. Sixty-seven strikers were arrested.

The Chicago police, the Republic Steel police officers, and most newspapers reported it as a labor riot brought on by provocateurs—among them pickets who wanted to take the plant by storm and attack those nonstrikers who "were just doing their jobs." The *New York Times* reported it under the three-word headline STEEL MOB HALTED, describing how union demonstrators armed with clubs, slingshots, cranks, bricks, steel boots, and other missiles had attacked the police. The *Chicago Tribune*, describing the encounter as an invasion by a trained military unit of a revolutionary body, explained that the police had no choice and called it "justifiable homicide." All who wrote about it assumed that the first shots had been fired by the strikers. No reporter bothered to investigate further.

The public response to this violence, as reported by newspapers and radio, did inalterable damage to the cause of the organizing steel workers. Soon afterward, the strike was broken, the issue lost. Even President Roosevelt and other liberal politicians appeared indifferent, if not hostile, to the victims of the slaughter.

That would have ended the saga of the Memorial Day Massacre but for the fact that a Paramount cameraman, Orlando Lippert, who had been diverted on his way from Chicago to cover the annual Indianapolis 500 mile race, was stationed on his camera car outside the Republic Steel mill when the violence erupted. At the sound of the first shot Orlando Lippert started his 35 mm. camera and, with few stops or lens changes, recorded the startling scene. He sent several magazines of film back to the Paramount Newsreel organization in New York. After viewing the film, the senior editor decided not to release it. The Paramount library card was stamped RESTRICTED NEGATIVE. CLIPS AND PRINTING OF THIS MATERIAL ABSOLUTELY FORBIDDEN. That card with its impounding stamps is now a museum piece.

In 1972 it is difficult to imagine how news professionals in and out of the newsreel business could have allowed this film to be suppressed. But it required a young University of Chicago professor named Paul Douglas to pry loose the film and to unravel the Massacre mystery. The future Senator from Illinois, then an economist and chairman of the Citizens Rights Committee investigating the Massacre, telegraphed Paramount News, asking for release of the confiscated film. Douglas had been prodded into sending the telegram by Paul Y. Anderson of the *St. Louis Post-Dispatch*, who first heard of the film's existence. A. J. Richards, head of Paramount News, refused the request. He wired Douglas:

"Find your wire awaiting me upon my return to city. You asked fair question which entitles you to fair and frank answers. Our pictures of the Chicago steel riots are not being released any place in the country for reasons reached after serious consideration of the several factors involved.

"First, please remember that whereas newspapers reach individuals in the home, we show to a public gathered in groups averaging 1,000 or more, and therefore subject to crowd hysteria while assembled in the theater. Our pictures depict a tense and nerve-racking episode which in certain sections of the country might well incite local riot and perhaps riotous demonstrations in theaters, leading to further casualties.

"For these reasons of public policy, which we consider more important than any profit to ourselves, these pictures are shelved, and so far as we are concerned, will stay shelved. We act under editorial rights of withholding from the screen pictures not fit to be seen. This parallels the editorial rights exercised by newspapers of withholding from publication news not fit to be read. Thanks for your inquiry."

Prof. Douglas did not take Richards' "no" for an answer. He sought the assistance of Sen. Robert M. LaFollette, chairman of a subcommittee of the Senate Education and Labor Committee, and the Senator's staff assistant, Robert Wohlforth. The committee decided to subpoena Orlando Lippert, with his film. That morning in June of 1937, when Sen. LaFollette asked that the lights in the hearing room be dimmed, he invited Chicago police officials to sit near him, where "they can look directly at the screen." When the film, exhibit 1406, was screened, a sense of shock at the ghastly massacre choked the room. Reporter Anderson, who had helped Douglas locate the film, managed to be present at the viewing. He then "broke security" by filing an eyewitness report of what he saw:

"Without apparent warning, there is a terrible roar. Pistol shots and men in the front row of marchers go down like grass before a scythe. . . . Instantly the police charge on the marchers. Although the mass of the marchers are in precipitous flight, a number . . . have remained behind, caught in the midst of the charging police. In several instances from two to four policemen are seen beating one man. One strikes him horizontally across the face, using his club as he would a baseball bat. Another crashes it down on top of his head. The scene shifts to the patrol wagon in the rear. Men with bloody heads, bloody shirts are being loaded in. . . . A policeman, somewhat disheveled, his coat opened . . . approaches another who is standing in front of the camera. He is sweaty and tired. He says something indistinguishable. Then his face breaks into a sudden grin. He makes motions of dusting off his hands and strides away. The film ends."

Watching the film thirty-five years later, one finds new cameos of brutality at each screening. It is much like scanning Goya's *Disasters of War*; sometimes it's a closeup of a woman being kicked or punched; sometimes it's a single striker running the gauntlet of policemen until he is clubbed into unconsciousness. The soundtrack has general riot sounds, the only "readable" dialogue being, "God Almighty."

After completion of the LaFollette hearings, Paramount Newsreel, which had forfeited its exclusive to reporter Paul Anderson, released the film in hundreds of theaters in a reverse kind of journalistic enterprise. The only city where it was not shown was Chicago—where it was banned by the police. With fanfare and the banner caption EXCLUSIVE—NOW IT CAN BE TOLD, the narration over the brutal pictures communicates a tone that was clearly pejorative to the strikers:

"Comanding police officials declare they argued and pleaded with the strike leaders to turn back. . . . The deaths and injuries, police officials declared, were the unavoidable casualities of a determined mob advance against life and property."

But the pictures spoke louder than the contrived words. The film, together with other still pictures and a long series of other witnesses, including Ralph Beck of the Chicago *Daily News*, who testified that he saw police officials "fire pointblank into the crowd," convinced the Senate committe that "the first shots . . . came from a police revolver." The committee report adds, "It also appears to establish that the eastern portion of the crowd was in full retreat before the prolonged volley of shots occurred." The LaFollette Committee report was sharp in its criticism of the Chicago authorities for bloodshed that was "clearly avoidable by the police." The excessive force "must be ascribed either to gross inefficiency . . . or a deliberate effort to intimidate the strikers."

Thirty days after the massacre on Burley Avenue, public opinion turned against Republic Steel and the Chicago police. In the heart of steel country, the Youngstown, Ohio, *Vindicator*, which had previously judged the strikers as the cause of the violence, reversed its position and held the police "guilty of shocking brutality." Not all newspapers and radio stations were so fairminded.

History would remember it as a police riot. But history's verdict came too late to affect the course of events in 1937. Chairman Girdler and "Little Steel" prevailed because of the wilful suppression of a horrendous act. The Paramount Newsreel editors had taken part in a conspiracy against the people's right to know, either because of their own timidity about what they thought the American public could not tolerate, or, more likely, because of pressure from Chicago city officials or executives of Republic Steel. How ironic that in 1937 the subpoena had to be used as a prod to wrench loose newsfilm of a manmade disaster.

Paramount was really in show business, not journalism. There were few traditions of news integrity such as now exist in broadcast journalism. Yet one can speculate about the pressure that might be applied to a government-licensed TV station if the local establishment was embarrassed by a disorder caused by law enforcement units. Indeed, the news media today might be accused of staging or of causing the attack to take place; but it is difficult to imagine a TV news organization attempting to kill such a story. That's today. National moods, however, change, as the politicians who are trying to create a new "climate of restraint" well realize. In fact, at the time of Morley Safer's reporting of the village at Cam Ne with cigaret lighters, there was pressure on CBS not to run the film. One very high official in the Johnson Administration said in anger, "Don't you news people ever ask yourselves what's good for the United States?" I told him I didn't know any newsmen smart enough to figure that out on a day-to-day basis. Then I told him about the Memorial Day Massacre film.

My dogmatic editor friend remains unconvinced, but the principal lesson of the Memorial Day Massacre film is the consequences of selfrighteous or externally pressured editors suppressing a story in the interests of "preserving the public [illegible] or of [illegible]ving some mythical *raison d'état*. The Massacre episode also puts into perspective the proper function of the subpoena. The LaFollette Committee [illegible]hed on no indiscriminate fishing expedition concerning the plots and [illegible] activities of fictional conspirators. They were in search of critical and [illegible] evidence that to their certain knowledge existed and which related [illegible] to the Committee's mandate: an incident which "violated free speech [illegible] rights of labor." The filmed evidence that the Committee requested [illegible]available from any other source and involved no confidential relation- [illegible] most important, Paramount admitted its existence and could not deny its [illegible]vance to the investigation. In 1937 and in 1972 those are pretty fair [illegible]des for the use of the supoena.

[illegible] there may be other instances when a subpoena combines the common [illegible] good law and good journalism. Suppose a reporter from a financial [illegible]e weekly had some unused notes in which Dita Beard verified that she had [illegible]tely written that memo to her ITT vice president? Suppose that a Missisippi TV station had in its files some outtakes from an interview with the alleged assassin of Medgar Evers which would have strengthened the prosecutor's case? Would not the subpoena of that information have served the people's right to know? Suppose outtakes of the Zapruder film exposed in front of the Texas School Book Depository at the instant of the assassination of John F. Kennedy had been withheld by *Life* magazine? Would the use of the subpoena not then become mandatory?

Unfortunately, the argument against the use of a subpoena is sometimes abused by new organizations in misguided efforts to demonstrate the shield principle. WBAI, perhaps the most courageous radio station in New York City, recently refused a subpoena from the District Attorney to produce a mimeographed manifesto supplied to its news department by the Weathermen. The station had not gained the document by investigation or by some confidential relationship with the organization. Rather, it had been used by the Weathermen as a way of publicizing their bombing of a state office building in Albany as a protest against the handling of the Attica prison uprising. In this case, the prosecutor was not on an idle fishing expedition but was in need of a specific piece of paper whose contents the station had already transmitted about a crime that had already happened. In fact, the crime had been identified as the work of those who made their bombing promise over the station's airwaves.

What is also on trial is not just the use and abuse of the subpoena, but the use of the entire grand jury system. These "grand inquisitions" which were once intended to protect the accused have been transmogrified by zealous prosecutors into carefully orchestrated secret hearings in which the prosecutor calls the witnesses and instructs the carefully chosen juries on whom and what to subpoena. A newsman who appears before a grand jury may easily destroy delicate, confidential relationships, since his sources have no way of knowing what he does or does not tell the jury. When Orlando Lippert appeared before Senator LaFollette's committee, his testimony became a matter of public record. Perhaps when a newsman appears beforee a grand jury, his testimony should also become a matter of public record, thereby providing testimony untainted by the cloak of secrecy. What is anathema to the journalist is the closeted nature of the ritual, for it may make him appear to his future news sources as a stool pigeon.

The glaring difference between the subpoena that Senator LaFollette issued and the one that the federal grand jury in the Nothern District of California issued to Earl Caldwell was in the distinctly different motives behind them. The trouble with the cases against Caldwell and his fellow journalists Banzburg and Pappas is that in each subpoena, prosecutors were trying to "catch a thief" in crimes that may never have happened, with evidence that may never have existed. Reporters worthy of that name leave little useful material on cutting room floors, and the number of convictions via reporters' unpublished material must be microscopic. The unfortunate effect of the *Caldwell* decision is to chill, not to enlighten. The flawed net in which the Government sought to entrap him and the other defendants may temporarily ensnarl them in their legal webs, may in fact damage their ability to function as journalists, but it will produce no useful evidence and, ultimately, serve no one's right to know.

The grand jury's need to know is neither more nor less critical than that of the public. What courts and judges do need to know more about is the way journalists work, lest popular government be but a "preclude to a farce or tragedy," as Madison put it. For example, judges should know about the demoralizing effect a subpoena has on a journalist and how even the threat of a subpoena hinders the free flow of news. After CBS News correspondent Mike Wallace completed an exclusive interview with Eldridge Cleaver in Algiers, he was hounded by U.S. Atty. Gen. John Mitchell and aides who urged him to come in with outakes and "just sort of talk about Cleaver and how and by whom the interview was arranged." No subpoena was ever issued, but Wallace got the message. Mitchell also got a message back from Wallace. Wallace's message may have had something to do with the guidelines about the proper use of a subpoena on journalists that the Attorney General directed Asst. Atty Gen. William Rehnquist to write. Ironically, when the *Caldwell* case reached the Supreme Court, Justice Rehnquist was there to vote on a case which some observers believe his guidelines may have rendered moot.

Judges and prosecutors also need to understand the difference between the use of a journalist's camera as a newsgathering instrument and its use as an evidence collector. A journalist who enters hostile territory, whether it is in

Watts, on the Columbia campus, or in Attica prison yard, is handicapped enough without having himself viewed as an arm of the law collecting a rogues' gallery for future prosecutions. The effect of agents posing as cameramen and reporters is no less deceptive than that of a reporter masquerading as an officer of the law.

The journalist, on the other hand, needs to understand that because he has certain professional privileges he is not a privileged character who is above the law. There are times when the first amendment clashes with other parts of the Constitution, and it is the courts' responsibility to determine where the balance rests. It may sound heretical for a journalist to utter such thoughts, but every amendment can't always prevail. That is why journalists need to know more about how the doctrines against "prior restraint" evolved from Blackstone and English Common Law; what the relationship of *Near vs. Minnesota* is to the Pentagon Papers; and how the Fairness Doctrine relates to the first amendment as it applies to the electronic media. They also need to know much more about grand juries and about due process, lest the first amendment become an arbitrary rulebook which courts interpret according to the politics of their time, which is what we may have just witnessed in the *Caldwell* case.

If there is to be a newsman's privilege law, it cannot be a product of judicial decision. Protection must come from those who make laws, not those who interpret laws that may not really exist. A shield law must be precisely drawn. It should provide protection from the prosecutors and others bent on fishing expeditions but at the same time be limited enough not to produce all-purpose immunity for journalists. The shield law and the guidelines by which journalists work must be structured in such a way as to provide protection for the public's need to know, but not a sanctuary for those who because of fear, special interests, or just plain irresponsibility are seeking a privileged place to hide.

Above all, a journalist needs to understand the uses and the abuses of the subpoena. The subpoena can be a paralyzing arrow aimed at our backbone, but—as in the case of the Memorial Day Massacre film—it can also be a liberating force intended to keep our backsides from resting too comfortably. That is the lesson of the subpoena that provided the newsreel with a landmark moment which all but a few old Chicago hands have forgotten, if, in fact, they ever knew about it.

It has been said that journalism is too important to be left to the journalists and indeed the law is too vital to be left to the lawyers. The tragedy is that the only time these two corps turn to each other is across a courtroom or in anxious preparation for such a confrontation, or in some kind of emergency session brought on by the abuses of fair trial-free press, as in Dallas in 1963. What is required is a continuing dialogue on a scheduled basis with a prescribed agenda.

There is a course at Columbia—Journalism and the First Amendment—but except for three or four visiting "firemen" from downtown, it is intended for future attorneys and reporters. Ed Murrow and I used to talk to lawyer, Joseph Welch, of Boston about a TV program to be called *The News and the Law*, but that was intended for the public. What better memorial could be created for these two teachers who loved each other's profession than a Murrow-Welch series of regular seminars in which editors and reporters would join with judges and lawyers in a search for common new ground? The subpoena impasse will not be broken without hard work, nor will the fair trial-free press problem be solved merely by unleashing platitudes about the first amendment against those about the fifth and sixth, and vice versa. We need a new breed of journalism under law and a new kind of law that reckons with twentieth-century communications—and that might emerge from the two professions' talking with each other, not at each other. The media and the Government have an adversary relationship, but if we permit it to grow into a stranglehold we shall all end up in a bitter deadlock which journalism cannot win and due process cannot endure.

Justice Byron White and reporter Earl Caldwell have more in common than their recent notoriety. Now that the celebrated case is over it would be providential if in their respective routes back to the courtroom and the newsroom they would pause to meet in a seminar room. The syllabus is ready. The reading list is yesterday's law and tomorrow's headlines, and we are all very late for class.

[Copyright © 1973, *Columbia Journalism Review*, All Rights Reserved.]

[From *Trial*, January–February 1973]

The Scholar Invokes His "Privilege"

(An Interview with Professor Samuel L. Popkin by Eda M. Gordon, Senior Editor, *Trial*)

I expected to meet a man outraged by the abuses of the grand jury when I sat down with Harvard Professor Samuel L. Popkin on the morning the appeals court had refused his testimony stipulation that could have saved him from going to jail two days later on a contempt indictment.

Instead, Professor Popkin, a former colleague of Daniel Ellsberg and witness for the grand jury investigating the leakage of the Pentagon Papers, was resigned to whatever fate was in store to maintain the moral position he had held since he was first subpoened in mid-July 1971.

"What I am fighting about and what I am willing to go to jail for is not to create a privileged class of intellectuals or journalists but to protect the responsibilities of people whose function in our system is to gather and disseminate information.

"The problem should be seen more as living up to your responsibilities than fighting for privilege," Popkin said.

"I feel I have a very strong responsibility to protect the flow of news and not to involve people I have talked with unnecessarily in administrative sanctions of any kind."

Adhering to that position led Professor Popkin to soften the position of total noncooperation held by *New York Times* reporter Earl Caldwell when called before another grand jury questioning the sources of his article on the Black Panthers. The constitutionality of Caldwell's refusal went all the way to the Supreme Court, which ruled that a journalist did not have the privilege under the first amendment to protect his confidential sources.

Professor Popkin and his lawyers, William P. Homans, Jr. and Daniel Klubock of Boston, wanted to test the same ground for scholarly sources, but not to that extreme:

"When we decided we wanted to raise the question of protective orders and appearances, the only guide was the *Caldwell* precedent, where the 9th Circuit had held that Earl Caldwell of the *New York Times* need not appear before the grand jury. At the very beginning we were going to take that position. But when we sat down to write up the constitutional principles involved, to ask other scholars for supporting affidavits, we very quickly realized that Caldwell's position was not tenable as a general rule. We didn't believe that full blanket immunity was justified in our case: we didn't think that the first amendment was so broad that it could totally exempt anybody who said they worked for a newspaper or was a scholar from any kind of appearances on any subject, whether or not it was related to their work."

In Professor Popkin's words, he faced "two battles—the abstract battle for everyone who does research or writing, whether scholar or journalist, and the very narrow battle of not harming the real concrete interests of totally innocent people I had been involved with in my own research."

"The second narrow front was an absolute," Popkin explained. "The broader battle under no conditions is ever going to be made, won or lost in a single case. And I saw no reason to try to be a 'Harvard hero' and take some totally abslutist position which I thought would do more harm than good to myself and to everyone else in the long run."

But, Popkin added:

"I have won what I consider some very important limited victories. The courts in my case actually threw out 11 of the 14 questions which I had refused to answer. One circuit court judge went so far as to label some of the questions 'repugnant.' Another judge on the circuit simply said they were 'badly phrased.' I consider this an important step in bringing courts into closer supervison over grand juries."

Judicial scrutiny is one reform Professor Popkin insists is necessary to ensure that the grand jury will fill the role for which it was intended; "until then, the process is dangerous."

"I can understand why the courts are very reluctant to get involved in grand juries—it's one hell of a lot of work.

"The answers in the long run are simply going to have to be that the grand jury process is reformed, that there is more prior communication between prosecutor and lawyer, that the structure of the testimony is cleaned up in some way to separate fact from innuendo, that prosecutors do their homework and think out their questions so that they don't have to keep the grand jury sitting around for hours to get a few questions answered, that controls be put on what happens to the transcript so that the witness feels less vulnerable to misuse of his testimony." Without these reforms, Professor Popkin is convinced "the courts will do nothing. They simply don't want to get involved in reading all transcripts and deciding on individual questions and splitting hairs.

"But the courts must be sensitive to the use of grand juries to suppress news flow, which is a very real threat inherent in grand juries. Every government has an understandable but threatening interest in controlling the flow of news to the public. There's nothing surprising about the head of an agency or a police chief or a mayor or a Cabinet member not wanting anyone in his employ to talk or let out information but that does not mean he should be able to use the grand jury system to his advantage, which is now very possible.

"What better way is there for a corrupt local government, even national government, to keep certain kinds of information from the public than to use the pretext of a grand jury investigation of a crime to ask people like myself questions that would elicit information about who his sources were—beyond what is truly needed in direct investigation of a crime. The huge powers of the grand jury make it a perfect way to find out who the honest policeman is who is talking to the reporter about police corruption, or who the people are in the army that talk to me about the problems of policy in Vietnam—just implicating people. You write a story about corruption in the city and the local DA calls a grand jury and says, 'Who told you this information?' And he can say, 'Of course, that is a legitimate request because I want to stop corruption and need this person's evidence.' But what guarantee is there that he won't simply fire this person?

"In some ways I could argue that scholars need more protection than journalists. Officials through the grand jury could stop whole fields of research and publishing in this country. There are classes of work that scholars do that journalists don't where some protection is 100% essential—like long-term studies of the drug culture, or studies of deviant behavior, or studies of administrative procedure.

"Even beyond that, even moe important to everyone who appears before grand juries, are the basic kinds of intimidations and abuses of the process by prosecutors whose minds are made up about exactly what they want and are just determined to maneuver particular people into giving particular pieces of evidence without giving them their legal rights.

"What concerns and angers me so very much is that a person behaving in a totally constitutionally approved, legally sanctioned, responsible and respectable manner as a citizen can have his every statement and movement interpreted as evidence of a conspiracy, a crime or hidden testimony.

"When you ask to see your lawyer, why are you always asked, 'Well, this is a question of fact, not of law—why do you want to see your lawyer?

'The way that you can hear the prosecutor say before the grand jury, 'Oh, if we were tapping your phone, you mean we might have heard *something?* The kinds of runarounds you get because prosecutors don't even have to tell you what they are after and because they are in a position to totally manipulate what happens in the room.

"I find it very upsetting that this secrecy, which is supposed to be there to protect witnesses, also seems to be a coverup for prosecutors, who seem to think they can do whatever they want." Professor Popkin said.

Notwithstanding the prosecutor's potential tyranny, Professor Popkin does not immediately espouse the popular solution—to allow the witness' lawyer to be present in the grand jury room.

"For me," he said, "I see an advantage for the lawyer to be in the hall because I can get the question down perfectly and then we have a slight amount of privacy where I can relax and talk with him out loud about how I should answer the question to make it fully clear, so that the prosecutor won't have to bother with 10 more questions; we'll be able to get on to the next subject.

"On the other hand—and I don't mean to be elitist—I think a lawyer in the grand jury room may be necessary for the average witness, who do not have a Ph.D. and has not been working with a lawyer for six months, to help make distinctions that only a lawyer is used to making."

Though "not optimistic about judges being willing to do anything they consider tying anyone's hands in a legitimate investigation—especially judges at the state level, where many are close to prosecutors having been prosecutors themselves—

Popkin contended: "Unless courts take more seriously the role of overseeing grand juries, there is no alternative between total talking and total protection. Anything but an absolute position against appearance will only work if judges are willing to look at transcripts, to think about balancing and relevance."

Professor Popkin described his own grand jury experience before four different prosecutors to exemplify the need for a judicial overseer—to preserve not only the integrity of the grand jury process itself but the rights of the individual witness:

"I am a case of somebody who doesn't seem to have any information whatsoever relevant to the investigation as far as I can tell. But the prosecutor clearly wanted some kind of an indictment of someone associated with the Pentagon Papers. To this day I don't know why it is they are pursuing me, unless—I don't like to suggest it but it seems rather probable at times—they are trying to go far beyond Ellsberg in stifling information flows from the government. Knowing that I am a Vietnam scholar and that I know and have been intimate with large numbers of people in Vietnam and Washington involved in Vietnam policy, they may be using this case to make sure that no one ever says anything to me or people like me. That's all still supposition because they never said anything.

"That is one of the problems that bothers me most about this system: I have never been told—except in the most extraordinarily vague way that I am being questioned about specific statutes or a specific case—why I am being called all the time.

"My testimony and statements make it absolutely clear that I was not a physical integral part of any planning or anything that happened or how anything happened. How or why anyone sees me as involved I simply do not know. You simply are not able to find out something as basic as what it is the prosecutor thinks you know.

"Several times we tried to quietly sit down with the government attorney and one of the prosecutors and say, 'Just what is it you seem to be poised and waiting for me to tell you? Maybe it's something that no concept at all of the First Amendment would cover, that I could simply tell you.' Nobody would ever say to you what it is they were after in any way."

A one-and-a half-hour interrogtion by two FBI agents at his Harvard office—"I assumed there was some kind of dragnet to find out who knew what"—precipitated Professor Popkin's subpoena.

After being read "what I understand now as an alternate Miranda statement which sounds to someone who is not used to being approached by two FBI agents that you shouldn't need a lawyer because until you mention a lawyer there was no reason to believe you've done anything," he was asked "a great deal of questions which I answered at length, particularly making clear that I simply had no idea this was going to happen, that I had never seen anything that could be construed as part of what had been released, that I didn't know anybody was going to do it, never had it and never seen any of it.

All sorts of questions were also asked me that didn't sit right, like: 'Does Ellsberg seem to be a nervous person? Is Ellsberg emotional? Is Ellsberg erratic?'—questions that at the time I though were there to impugn the person, to try to paint him as a neurotic, or a crazy person or a person with a grudge or a vendetta. I said very bluntly that I didn't see what any questions like that had to do with any criminal investigation, and Daniel Ellsberg was someone I respected and I simply was not going to get involved in some kind of mudslinging contest—which is what I thought they were doing. They told me they were just trying to understand Ellsberg and his motives.

Since it is rather unusual for the FBI to come unto the university campus, they needing special permission to do so, Professor Popkin is under the impression that for some reason the FBI thought he would know something about the case. "Why the FBI thought I knew anything, what it is they thought I knew or what system or replies and nonreplies to this day I do not know."

After unsuccessful moves to have his subpoena quashed on the basis of first and fourth amendment issues—questioning not only the possibility of wiretapping but also the subject of the investigation and the relevance and pertinence of the questions ("This was an integral part of our case from the first.")—Professor Popkin appeared before the grand jury on August 19.

"My first contact with the manipulative side of the grand jury," he tells, "came when I asked the prosecutor 'May I please be told the subject of the matter under inquiry.'

"The prosecutor reared up at me and gave a long lecture in a very stentorian voice, saying: 'The judges just told you that you may not ask this question, to appear here immediately and testify. Please don't keep these people waiting. Why are you trying to hold up the process of justice?'

"A very demeaning kind of experience.

"The prosecutor knew the issue of relevance was open, that I was supposed to ask this question that there were legitimate constitutional reasons why I was asking what the subject was, but immediately there was this tone of "Why are you bothering these people?'

"Not having immunity, I immediately took the first, fourth and fifth amendments on three totally trivial elementary questions: 'Do you read the *Boston Globe*, the *New York Times*?'

Of course, when you take the fifth on a trivial question, the prosecutor instantly does everything he can to implicate to the grand jury that—uh-huh—you're hiding something. He doesn't tell them, and you're not allowed—certainly unless you are very informed and confident—to say: 'There's this whole problem with the concept of links in a chain and if you don't take the fifth amendment on a trivial question, a totally harmless question, you may be forced to answer all questions.'

"The grand jury clearly didn't know what was happening and I was to sit there and let myself be made to look like a fool. There's always the temptation before a grand jury to stand up and tell the grand jury members exactly why you are doing things. It's a humiliating experience for someone like me to sit there and be made to look like somebody who is trying to bother the people of the grand jury or to waste their time or to be picayune or to obstruct justice when doing things that absolutely must be done for legal, constitutional reasons.

"And if I am so intimidated and have so much trouble in the room—and I have a Ph.D. and am used to very rapid verbal interchange, intellectual argument and finicky detail over hair-splitting of words—what happens when a semi-illiterate, or someone who barely speaks English or just an average person gets in the room? It took me months of mental preparation before I was able to sit there without shaking every time I asked to see my lawyer and I had to argue with the prosecutor. What happens if just any man or woman is pulled in on suspicion and asked a million high-pitched fast questions—does he really have time to understand what he is doing, to think out the question—to give an honest answer and not just what the prosecutor wants.

"Moreover, I think anyone who testifies before a grand jury without immunity must be crazy because given the extraordinary nature of what can be construed as a conspiracy: for all I knew saying to a person 'Gee, you're interesting, I can't wait to read your book' might be construed as a conspiracy to release information. In that context, no sane person would think he was safe to go in and answer questions without immunity.

"Now here's one of the real cruxes of the grand jury system: I was willing to answer a very, very large number of questions as accurately and fully as I possibly could because no concept of the first amendment whatsoever would have said, 'Don't answer.' And I would always want to go over them with my lawyer. Every time I would leave the room I would get into a tremendous argument about: 'You're wasting these people's time, you're keeping it boring to them, why do you want to see your lawyer?'

"A grand jury in theory is there to investigate and tell the prosecutor what to do, but in real life the prosecutor totally runs and owns the grand jury, at least in this case. The only time the foreman of the grand jury ever speaks is when he is given a hand or an eye signal. No member of the grand jury ever does anything except watch the show. They simply are there—the vehicle for a prosecutor to gather information and make a case. They don't get involved at all. It has made me wonder to what extent these people are instructed or trained or truly apprised of *their* role. It is the grand jury members who are supposed to ask questions; they are supposed to be involved. They are not supposed to be made to sit there just to legitimate the process.

"I am very curious, for instance, to know how the foreman is chosen. I look around the room—I've spent more than eight hours watching these people—and there are clearly some extremely alert people in the room, who, probably because they have read the newspaper, understand what is going on and that there are important constitutional issues at stake. One of the least alert-looking people in the room was the grand jury foreman. He seems to be an extremely affable nice person but he is hard-of-hearing and does not seem to be very aware of everything that is happening.

"And I believed the grand jury, not just the prosecutor acting alone made decisions. Whenever I had to leave the room to see my lawyer, I would always ask, 'Mr. Foreman, I would like to see my lawyer.' I always addressed my questions to the foreman; several times I addressed statements to the grand jury asking their help to fend off unnecessary battles. I was always put down by the prosecutor. Whenever, for instance, I would ask the relevance of a question, I was always told that 'the grand jury does not have to answer questions.' Or if I asked to see my lawyer the prosecutor would say, 'Mr. Foreman, you may give him permission.'

"This is very unsettling, if you think there is a role for grand juries, as grand juries, as an arm of the judiciary. The way the process works now, I don't see why we just don't throw out the people and say anytime the government wants they can put a prosecutor and stenographer in a room, give you immunity and make you answer whatever they feel like. What is the purpose of having a grand jury there if care isn't taken in what they are told, how they are trained and how the foreman is selected?"

Professor Popkin does not conclude, however, that grand juries should be totally eliminated from this system. "I think the alternatives may be much worse.

"The first step," Professor Popkin suggests, "is for people to be aware of what goes on in the grand jury process. What staggered me is that even at places like Harvard Law School people knew so little about grand juries. I was shocked to talk to law professors who really had not thought very consciously about the fact that lawyers were not in the room with their clients. People haven't paid attention. The grand jury system has been seriously abused because liberals basically didn't care as long as the Mafia or corrupt teamsters were being prosecuted.

"Maybe the best thing that has come out of my case is that a lot of people will realize what kinds of hell a lot of others have been going through."

But one having acknowledged this hell—the 'clear and present danger' of grand juries as a manipulative process and a distinct curb on the flow of news to the public—Professor Popkin struggled to justify the value of the grand jury. His rationale goes as follows:

"The theory says the legitimate value of a grand jury is to insure that a case is not brought to court without a panel being convinced that there is a legitimate case.

As much as 30 to 40 years ago Wayne Morse, when getting his Ph.D. in law at Columbia, pointed out how very rarely grand juries ever fail to return an indictment that the prosecutor wanted, that, in fact, the amount done by the grand jury can be very small.

"The theory is very appealing, though, and you keep thinking there are ways to make the grand juries do what they are supposed to do.

"And there is another issue—a very sticky issue that is not as clearcut as either civil libertarians or law-and-order freaks make it appear: Does the successful functioning of a democratic system require compelled testimony or not?

One of the arguments against the grand jury is that people shouldn't have to testify unless they want to. The radical or Left perspective argument goes: 'In a democracy, when there is a real problem, everybody will want to testify.' "That really underestimates the whole problem: No one has yet found a way to develop a system where there is not some kind of primordial basic fear about getting involved with police and/or courts. I don't think the problem is entirely due to fear of the system because the feeling is very deep and goes into the highest economic and educated classes and has to do with all kinds of psychoanalytic problems about authority and intimidation.

"I am not ready to say you absolutely do not need compelled testimony of any kind.

"I feel very queasy about the issue of compelled testimony. Why is the fifth amendment protected but not the first?

"I don't think any absolute protection will ever be valid. There are always going to be a need for balances. I think the kind of crime involved should have a lot to do with the kind of protections granted.

"Using scholars and journalists as an investigative arm of the government is simply going to dry up the ability of writers of any kind to gather and disseminate information to the public."

Professor Popkin went to jail two days later, where he spent eights days—until the Boston grand jury was abruptly dismissed on the premise of avoiding any conflict with the Ellsberg trial soon to begin in Los Angeles, California.

During our interview Professor Popkin said:

"I have always felt that I should not ever go to jail just for the broad issue. I should only go if there were some real concrete professional ethical reasons I had to do so."

He went, manacled—reportedly the first American scholar to be jailed for refusing to reveal a source.

He went, sending a chill through the academic community, who, in the person of Harvard President Derek Bok, had futilely argued for the right of the scholar to conduct research without government interference and the responsibility of the scholar to keep confidential his sources.

The lower courts have denied scholarly or journalistic privilege. The United States Supreme Court has upheld these rulings. And legislators now vie over whether or not to enact "shield laws." Meanwhile, men—as principled as Professor Popkin but not so fortunate—stand behind bars in the cause of a free press.

* * *

Samuel Popkin was released after one week in jail when the justice department decided to dismiss the grand jury.

Upon his release from jail he stated, "In the 1950's, over reaction against Communism stifled and paralysed our ability to talk freely about our foreign policy. Today we may again be losing our sense of balance. With the grand jury as the instrument, the ability of scholars and journalists to provide others with the information essential in a democracy, may again be threatened.

"This case and others demonstrate that the courts and government need to be more sensitive to the need of the public to receive information concerning their government.

"If scholars and journalists cannot talk in confidence with officials, the first amendment will protect nothing more than polemics and official handouts."

[Reprinted with permission of copyright owner, *Trial* magazine.]

[From the *New York Times* Magazine, Dec. 17, 1972]

A Chilling Effect on the Press

(By Brit Hume)

WASHINGTON.—Ike Kleinerman, a C.B.S. News producer, took a camera crew through the South recently to develop material for a documentary on the problems of children in America. He hoped to arrange an interview with a mother who could describe vividly how the welfare system, with its prohibitions against payments to families with working fathers, has encouraged the breakup of homes. He finally found just such a woman. She was a welfare client who spoke eloquently from experience of the system's inequities. She agreed to be interviewed on camera, but only with her face averted and with absolute assurances she would not be identified by name. She had been secretly harboring her husband in her home and feared this would be discovered if she spoke out publicly. Although promises to withhold names have traditionally been routine in journalism Kleinerman called C.B.S. headquarters in New York to check. The matter was referred to the legal department, where the judgment was swift. Kleinerman was told not to give the requested assurance. The interview was canceled.

C.B.S.'s lawyers were reacting to the Supreme Court's 5-to-4 decision last June 29, in the so-called *Caldwell* case, that the first amendment gives journalists no right to conceal the identity of their sources of information from a grand jury. The Court acted simultaneously in three cases of newsmen who had been subpoenaed to appear before grand juries to expand upon information that was in their stories. Two of the reporters, Earl Caldwell of the *New York Times* and Paul Pappas of WETV-TV in New Bedford, Mass., had gained access to the inner workings of the Black Panther party. The other, Paul Branzburg of the *Louisville Courier-Journal*, had published an inside story on the drug trade which named no names. All three refused to identify their sources or to breach other confidences which they felt had made their reports possible in the first place. Pappas and Branzburg were ordered to testify by state courts and appealed to the Supreme Court. Caldwell was excused from testifying first by the Federal District Court in San Francisco and subsequently by the Ninth Circuit Court of Appeals, which ruled that even his appearance behind the closed doors of a grand jury room would damage his credibility with his Black Panther sources. The Government appealed his case to the Supreme Court.

Speaking for the majority, Justice Byron R. White wrote, "We are asked . . . to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do . . . We cannot accept the argument that the public interest in possible future news about crime from undisclosed unverified sources must take precedence over the public interest in prosecuting those crimes reported to the press by informants . . ."

Speaking for three of the four dissenters, Justice Potter Stewart argued that the Court "invites state and Federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of Government . . . when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it because the uncertainty about the exercise of the power will lead to 'self-censorship.' "

Justice Stewart's prediction, of course, fits precisely the circumstances of the canceled C.B.S. interview. And the chilling effect of the decision on the network does not seem to be an isolated example. For instance, Paul Branzburg, The *Louisville Courier-Journal* reporter whose case went to the Supreme Court, was also subpoenaed by a second Kentucky grand jury in connection with another story. At the height of the controversy, he learned that marijuana use had become widespread among well-to-do adults in one large Kentucky community. He gathered material for a story on it mainly through interviews with persons who used the drug. The *Courier-Journal*, understandably concerned that this might lead to conflict with still a third grand jury, decided not to use it.

Nicholas von Hoffman, the *Washington Post* columnist who has written often about radical political activity, says he has had a long-standing policy of trying to avoid being present during any activity the Government might want to investigate. "I always thought there was no way we could resist subpoenas, even before the *Caldwell* case," he stated. "When they first started talking about the Mayday demonstration at a National Student Association convention a couple of years ago," von Hoffman recalls. "I just got up and left."

A well-known Washington freelance, whose work has appeared in this Magazine, told how he abandoned the idea of doing a magazine article about a friend, who he had discovered, to his astonishment, was deeply involved in the soft-drug traffic. Because the man had strong philosophical, rather than financial, reasons for his activity, the writer thought his case would be interesting. His friend was eager for the public to hear his views and agreed to cooperate if he were not identified. When the Court ruling came down, however, the writer changed his mind. "I never even considered doing it after that," he said. In fact, the writer was so intimidated by the prospect of being hauled before a grand jury to identify his friend that he insisted his name not be used in this article.

Although there is no indication that the Government still wants the testimony it sought from Earl Caldwell, the long court battle has left him uneasy. "When the Government issued the subpoenas," he says, "they asked for more than just my testimony. They wanted documents, tapes and notes. Since then, I have destroyed other tapes and notes and papers that I might have been able to use for stories. In some cases, I did taped interviews where I promised not to use the material until some future time. Now I've destroyed these kinds of things—things that might have been invaluable to me."

Caldwell thinks the decision will be especially hard on newsmen trying to cover the activities of disaffected blacks, who tend to be suspicious of the press. "We could never promise these people that our stories would get in the paper, or even that, if they did, they would come out the way they were written. What we could promise were some things about ourselves—that we could keep confidences. Now we can't even do that." Caldwell says he is seriously considering leaving the newspaper business.

Interestingly, one who is not concerned about the impact of the Court's action is Joseph Alsop, the syndicated Washington columnist best known in recent years for his ardent support of American policy in Vietnam. Alsop's column has frequently contained sensitive military and diplomatic information, but it has usually supported the Government's position. Asked about the Court ruling, Alsop said, "I can't imagine that it would ever affect me at all." He added, with obvious reference to the Pentagon Papers case and the publication of other classified documents by the press, "I'm sort of old-fashioned, and I set some limits that other people don't observe." Besides, he said, "There's no law that makes it illegal for an official to talk to a newsman."

The journalists most disturbed about the *Caldwell* decision would argue that Alsop's last remark is precisely their point. The decision is not likely to stem the flow of official statements or even official leaks of restricted information. The orchestrated release of classified material by those in power has long been a familiar practice in Washington. During Congressional deliberations over the Pentagon's budget requests, for instance, such leaks have been known to become a virtual shower of secret intelligence on enemy activity—usually the very kind of activity some embattled Pentagon project is designed to offset. It hardly seems likely that the Defense Department will be deterred from releasing such information by the threat of a Justice Department grand jury investigation. And journalists who act as the conduit through which such material reaches the public obviously have little to fear.

Rather, it is reporters who cover activity frowned upon by the authorities or uncover facts embarrassing to them that seem likely to be hampered. For the sources of such information are now vulnerable to identification and punishment. It is impossible, of course, to measure exactly how reluctant such sources have become in the aftermath of the Supreme Court action. After all, reporters rarely find out about the stories they don't get. However, one indication of the decision's potential impact was given to Ronald Kessler, investigative reporter for the *Washington Post*. It came from a Government employee who had provided information that Kessler developed into a devastating series on conflict of interest and profiteering in land transactions by senior officials of the General Services Administration. At my request, Kessler asked the source if he would have cooperated had the *Caldwell* decision been in effect at the time. The answer was no.

Other investigative journalists say they have noticed changes since the decision. Jack Anderson, the muckraking columnist whose revelations have been so embarrassing to the Nixon Administration, says Government sources he has been dealing with for years have begun to ask cautious questions about the *Caldwell* case and to seek renewed assurances he would protect them. Anderson is deeply troubled about the long-term effect of the decision. "Our kind of journalism," he says, "require total protection of the sources or we go out of business. For the kind of stories we do, there are no press briefings, no press handouts. I have to rely on unauthorized sources to get secrets, mainly political secrets. You cannot get them from official sources. And you cannot allow the sources to take the risks. I have to take the risks and now the risks in doing this kind of reporting, which have always been high, have been multiplied."

By "taking the risks," Anderson means that if he is subpoenaed and ordered to identify a source, he will refuse, whatever the consequences. His defiant attitude is shared by many, if not most, of his colleagues, who believe that the ability to keep confidences is indispensable to digging up news beyond what is officially sanctioned as fit for public consumption. Jack Nelson, The *Los Angeles Times's* crack investigative reporter, for example, says he now finds it necessary to promise sources he will go to jail to protect information received from them in confidence. His newspaper recently published a first-person account of the Watergate espionage case by Alfred Baldwin, one who participated in the Republican-financed bugging of Democratic headquarters. Baldwin's story was prepared on the basis of five and one half hours of taped interviews with Baldwin. Before he could get the interview, however, Nelson had to convince Baldwin's lawyer that he would keep confidential any information not used in the published story. "One of the first things his attorney brought up," said Nelson, "was the *Caldwell* decision. I had to persuade him if indeed I was subpoenaed, I would take all the risks."

Baldwin is expected to be a key witness for the prosecution in the *Watergate* case. At the request of counsel for one of the defendants, U.S. District Judge John J. Sirica has agreed to issue a subpoena for Nelson's tapes, notes and testimony. Nelson says he will fight the subpoena and refuse to testify, win or lose. His newspaper has promised to back him.

Nelson encountered similar misgivings recently from a onetime source in the Treasury Department whom he visited to gather information for a particular story. During their conversation, the man mentioned that he knew of another good story about highly improper conduct by a Treasury official. Nelson expressed interest, but the source balked. "He was aware of the Supreme Court decision," Nelson said. "He said, 'If I tell you, they'll come after you to get to me.' The guy was literally shaking. We went out in the hall, and I finally convinced him I wouldn't reveal his name and he gave me the information." Nelson's experiences might seem to indicate that the *Caldwell* decision is merely causing second thoughts, but not seriously impeding the flow of information to the public. Yet these episodes certainly raise this question: Is the press truly free where newsmen must put themselves on a collision course with the law to do their job?

Already, there have been some noteworthy collisions. Peter Bridge, a reporter for the now-defunct *Newark News*, was jailed recently for three weeks for contempt of court. He refused to answer a handful of grand jury questions that were related to a story he had written about official corruption but went beyond what he had actually published. Although he did not claim that a confidential source was involved, Bridge felt that the questions encroached upon his first amendment freedom by forcing him to disclose information he had chosen not to divulge.

Although Bridge's case has been the most celebrated so far, his sentence was light compared to the six-month term given Paul Branzburg for his refusal to name the persons who gave him access to their hashish-making operation in Louisville. Branzburg has moved to Michigan, where he now works for The *Detroit Free Press*. If he returns to Kentucky to serve his sentence, he will also face contempt charges for refusing to cooperate with the second grand jury which has sought his testimony. Gov. Wendell Ford of Kentucky has now moved to extradite him from Michigan.

A lengthy jail term may also be in store for William Farr, a Los Angeles newspaperman, for a story he wrote during the trial of Charles Manson and his followers for the murder of actress Sharon Tate and four others in 1969. Farr reported that one of the witnesses in the case had told the prosecution of plans by Manson and his group to kill other celebrities. His story broke after the trial judge Charles Older, had ordered eveyone involved in the case to make no comment to the press, to avoid prejudicial publicity. Summoned before the judge, Farr acknowledged that the information had come from a lawyer in the case, but refused to say which one. Judge Older held Farr in contempt. Farr appealed all the way to the Supreme Court, which refused to hear the case. Judge Older has now ordered Farr to jail until he names the source. Farr says he will never break the confidence.

The case is especially distressing to newsmen for several reasons. One is that the jury in the *Manson* case was sequestered at the time Farr's story appeared, and was thus presumably immune from any possibly prejudicial effects of a newspaper story. Also, the Supreme Court's refusal to hear the case, while it is technically not a ruling either way on its constitutional merits, seems likely to broaden the application of the *Caldwell* ruling beyond grand jury proceedings.

In his majority opinion in the *Caldwell* case, Justice White asserts that grand jury investigative powers "are necessarily broad." He speaks of the "ancient role of the grand jury, which has the dual function of determining if there is probable cause to believe that a crime has been committed and protecting citizens against unfounded criminal prosecutions." These doctrines are basic to the Court's ruling, but they are equally basic to the apprehensions of journalists about grand juries. The "necessarily broad" investigative powers cited by Justice White enable grand juries to use their subpoena power to delve into whatever they please. They need make only the slightest showing that the information they seek is relevant to a crime. In some states, grand jury investigations need not involve a crime at all, but may be a general inquiry into comunity problems. The possibility that their proceedings will be abused is heightened by the fact that they are conducted in total secrecy.

Justice White is certainly correct in saying that grand juries are intended to protect citizens "against unfounded criminal prosecutions." But the idea that the grand jury today actually functions as a vigilant citizen review board, preventing prosecuting attorneys from abusing their authority, strikes many journalists as a bit fanciful. As even most prosecutors will acknowledge, grand juries today willingly head in whatever direction prosecutors choose to steer them. And since most prosecutors are either elected officials or political appointees, politics is often a factor in grand jury investigations.

An example of how politics can affect the grand jury process occurred in Louisville a few years ago when the same prosecutor involved in the *Branzburg* case, Edwin A. Schroering Jr., summoned another reporter to testify. The reporter, Ward Sinclair, now chief of The *Courier-Journal's* Washington bureau, had written a series of stories, based largely upon public records, about questionable real estate dealings by members of the local aviation board. Sinclair appeared, expecting to help the grand jury dig into the improprieties. Instead, according to Sinclair's account, Schroering, a Republican like most of the aviation board members, defended the accused officials and fired hostile questions at him. The grand jury subsequently issued a report exonerating the aviation board and attacking Sinclair's paper for impugning the integrity of its members. Later, Sinclair says Schroering privately praised his investigative series and confessed to him that political considerations had been the reason he had rushed to the defense of his fellow Republican officials.

With the broad charter granted them, grand juries can easily conduct investigations for the sole, if unstated, purpose of identifying the sources of embarrassing news stories. As the Government brief in the *Caldwell* case put it, a grand jury "need establish no factual basis for commencing an investigation and can pursue rumors which further investigation may prove groundless."

A mild-mannered Pentagon employee named Gene Smith learned the truth of this the hard way when he was hauled before a Federal grand jury in Norfolk, Va., last year, under suspicion of having violated a vague and obscure law prohibiting "aural acquisition" of conversations. The investigation stemmed from a Jack Anderson column that reported in great detail how Pentagon officials had laughed, sung and told dirty jokes while making up the list of persons to be fired at Christmas time in 1970. When the Defense Department denied the story, Anderson offered to produce a tape of the meeting. The F.B.I. was called in, and Smith was identified as the prime suspect in taping the meeting. He was grilled mercilessly by military investigators. The F.B.I. visited his neighbors to ask about his drinking habits, his loyalty, his relatives and associates. Before the grand jury, however, Smith denied under oath that he even knew Jack Anderson. U.S. Attorney Brian Gettings acknowledged afterward to Anderson associate Les Whitten that "we probably do have the wrong man." They did.

In Memphis recently, a subcommittee of the State Legislature held hearings ostensibly to investigate reports, which appeared in The *Memphis Commercial Appeal*, that employes of a local hospital for severely retarded children had been dismissed for abusing patients. The stories had originated with confidential sources inside the hospital, but the hospital administration subsequently confirmed their accuracy. Nevertheless, the legislative investigation quickly became an attempt to learn the sources not only of The *Commercial Appeal's* reports, but also those of a local radio station, WREC. To the dismay of his colleagues, WREC newsman Joe Pennington appeared at a closed-door session of the subcommittee and identified a secretary at the hospital as his source.

Pennington says he named the woman at her request, but she denied being his source when called to testify. The subcommittee has turned the matter over to the state Attorney General for possible perjury charges, and the woman has been suspended from her job. *Commercial Appeal* reporter Joseph Weiler, meanwhile, appeared before an open session of the subcommittee, but refused to name his sources. The subcommittee has now scheduled a hearing at which Weiler must show case why he should not be held in contempt of the Legislature. The newspaper plans to fight the case as far as possible. Since the Supreme Court's decision deals only with a grand jury's right to know a newsman's sources, the question of whether a legislative body, either state or Federal has the same right is still presumably open.

Also still open is the question of whether a plaintiff in a libel suit is entitled to discover a newsman's sources. In a series of major decisions, beginning with the celebrated *New York Times v. Sullivan* case in 1964, the Supreme Court has made it extremely difficult for anyone mentioned in a news story to successfully sue for libel. The Court has ruled, in effect, that no matter how false or damaging a report may be, a newsworthy person may not collect libel damages unless he can show that it was published with the knowledge that it was false or in reckless disregard of the truth. The idea behind these decisions is that, under the first amendment, journalists pursuing even the most damaging kind of information should be free from fear of a ruinous libel judgment caused by an honest mistake. These decisions, of course, impose a heavy burden of proof on anyone suing a newsman for libel. The weight of this burden has led Federal Judge Howard Corcoran in Washington to order me to name the inside sources of part of a one-paragraph story I reported for Jack Anderson's column. The story raised some questions about a reported burglary at the headquarters of the United Mine Workers. U.M.W. general counsel, Edward Carey, who filed the burglary report, sued me, Anderson and the *Washington Post*, which carried the column, for a total of $9-million. The U.M.W., of course, has been the center of one of the major labor scandals of the century. Its president W. A. (Tony) Boyle, has been sentenced to five years in jail for misuse of union funds. The man who challenged him for re-election in 1969, Joseph Yablonski, was murdered in his bedroom, along with his wife and daughter, weeks after the election. One minor union official has already pleaded guilty in the killings, and a top union officer, a member of the executive board of the union's international Albert Pass, is presently awaiting trial.

Subsequenlty, Anderson cited alleged instances in which Smith's Pentagon superiors had listened in on employes' phone calls and tape-recorded staff meetings without prior warning. He challenged the grand jury to investigate these cases. But once the attempt to learn the source of Anderson's column was over, Gettings and his grand jury lost interest in "aural acquistion."

The best-known news source to receive grand jury attention, of course, is Daniel Ellsberg, whose release of the Pentagon Papers precipitated one of the major collisions between press and Government in American history. The conflict did not end with the Supreme Court's ruling that the Government could not prevent the publication of the secret Vietnam war study. The Government took the matter before a grand jury, which apparently had no difficulty accepting the novel interpretations of several laws under which the Government sought to prosecute Ellsberg and an associate, Anthony Russo, for making classified documents available. The pair were indicted and, after the dismissal of one jury, are still awaiting trial.

There are strong indications that the *Caldwell* decision marked only the end of the first stage in what will probably be a protracted controversy over newsmen's sources. Until the Justice Department subpoenaed Earl Caldwell in 1970, there had been occasional skirmishes between the press and the government over such sources, but a general spirit of mutual accommodation had made subpoenas rare and thus kept the undecided constitutional issue from coming to a head. Since *Caldwell*, the number of subpoenas for reporters' testimony has increased sharply, and the practice of calling newsmen before official investigative bodies to learn their sources seems to have become something of a fad. For example, *The State*, a newspaper in Columbia, S.C., has been at loggerheads of late with a local prosecuting attorney who subpoenaed three State newsmen to testify about a story on misconduct by officials and guards at a nearby detention center. Since the notarized statements by former inmates on which the story was based have been turned over to the prosecutor—without their names—the newsmen feel the only reason for the subpoena is to learn the names. Arthur Cooper, president of the company which publishes the newspaper, has called the subpenas "an attempt to intimidate *The State* and the former inmates."

It is hard to imagine circumstances under which my determination to protect my sources would be greater. But if Corcoran's order is allowed to stand, I might face imprisonment for contempt of court or a default judgment or both, for refusing to reveal them. What's more, allowing public figures to gain access to reporter's sources by sheer virtue of filing a libel suit could encourage a wave of such suits for just that purpose. Yet Carey has a point. If newsmen can refuse to name the sources of defamatory stories, they can effectively vitiate what is left of the libel laws by hiding behind anonymous sources whenever sued.

It is an extremely tough question, one that is presently being deliberated by the U.S. Circuit Court of Appeals for Washington, to which I appealed Corcoran's order. The Eighth Circuit Court of Appeals in St. Louis, however, may have found a way out of the dilemma. In a libel suit filed by St. Louis Mayor Alfonso Cervantes against Life magazine, the court ruled recently that a libel plaintiff was not entitled to learn a journalist's sources simply because he filed suit. The court held that "to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation, would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws." The court held that a libel plaintiff suing a journalist must make a "concrete demonstration that the identity of defense news sources will lead to persuasive evidence" of willful or reckless error in order to gain access to the sources.

Mayor Cervantes has now asked the Supreme Court to hear an appeal of the circuit court's ruling. If the appeals court in Washington goes against me, it would create conflicting rulings in two appeals circuits. This would heighten the likelihood of the Supreme Court ultimately having to resolve this issue. And, if the conflict between The *Memphis Commercial Appeal* and the Tennessee Legislature remains unresolved, it might give the Supreme Court still another aspect of the same question to decide.

The *Caldwell* decision has led to the introduction of more than 20 bills in Congress to enable newsmen to protect their sources. They range from a brief bill advocated by Senator Alan Cranston of California, giving newsmen an absolute privilege to keep confidences, to a variety of other bills granting a qualified privilege. The chances of any such bill being enacted, however, are dimmed by the opposition of the Nixon Administration. In testimony before a House Judiciary subcommittee, Roger Cramton, a Justice Department witness, argued that newsmen are adequately protected by a set of guidelines for press subpoenas issued by the Attorney General after the controversy over the *Caldwell* case erupted two years ago. The guidelines require basically that subpoenas for newsmen's testimony be issued only when the information cannot be obtained by other means and is essential to a successful investigation of a serious crime. Of course, these restrictions are not law, and may be ignored or revoked at the pleasure of the Attorney General. What's more, they are binding only on Federal prosecutors and have no effect on subpoenas at the state level.

The only kind of legislation that seems to have a chance of passage is a qualified newsman's immunity law. But there is considerable reason to doubt whether anything besides the absolute protection advocated by Senator Cranston would resolve the conflict. For there are qualified newmen's-immunity law~~s~~ in Kentucky, where Paul Branzburg faces jail, in California, where William Farr has been sentenced, and in New Jersey, where Peter Bridge has already been to jail. In all three cases, the courts held that the laws didn't apply.

Even so, a qualified law would at least place the burden of proof upon the authorities to show the need for a reporter's testimony. This would undoubtedly eliminate many unnecessary or politically motivated subpoenas. The chances for passage of even this legislation, however, are further hindered by the fact that the press, which could mount a potent lobbying effort, is divided over what should be done. Top media executives and the trade organizations that represent them seem ready to settle for a qualified bill, while rank-and-file reporters would generally prefer to push for absolute protection. The degree of disagreement within the media is illustrated by the fact that one contested subpoena for a journalist's notes was issued last year at the request of the Hearst Corporation, publisher of newspapers and magazines. It came in a Federal Trade Commission proceeding involving charges against the company of deception in the sale of magazine subscriptions. Hearst's lawyers accused the journalist, consumer affairs columnist Arthur Rowse, of "a naked effort . . . to avoid testifying." The subpoena was ultimately quashed on nonconstitutional grounds.

Although a recent Gallup poll showed public sentiment in favor of protection for newsmen's sources by a margin of 57 to 34 per cent, there is no sign that the public is much aroused about the issue. Public hostility toward the news media is high, as the widely favorable reaction to Vice President Agnew's attacks have shown. Although the press won the court fight over publication of the Pentagon Papers, many citizens were left wondering whether the press should have the right to overrule the decisions of duly elected and appointed officials who have chosen to classify information. Similar questions undoubtedly occur to those who have followed the press subpoena controversy. Why should newsmen be allowed to withhold information which public prosecutors say they need to conduct official criminal investigations?

One answer, of course, is that the press has a responsibility to investigate the government similar to the government's responsibility to investigate crime. Indeed, the Supreme Court in the past has recognized the duty of the press to explore both. In a decision 41 years ago overruling the shutdown of a newspaper in Minnesota, Chief Justice Charles Evans Hughes wrote ". . . the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press . . ."

The Chief Justice's words fit the circumstances of today even more than those of 1931. But the kind of "vigilant and courageous" reporting of which he speaks is the most difficult kind of all. It is virtually impossible without the cooperation of inside sources—cooperation which depends upon the newsman's ability to protect the source. Such protection may mean keeping the source's identity secret, or it may mean withholding part of the information furnished by the source in order to get other information. Whatever the arrangement, the reporter must abide by it, or he loses his sources. If the government has the power, at will, to learn the identity of newsmen's informants, or to force reporters to disclose knowledge they have promised to withhold, it has the power to shut off embarrassing or controversial news at its source. This may not be censorship as it is strictly defined, but the result is identical.

One can only guess what the founders of the Republic would have thought of this. Obviously, they were concerned, as everyone is, about crime and about national security. But they were equally worried about the transgressions of the government itself. A profound skepticism of official power runs through the thinking of nearly all of them. "To reason with government," said Thomas Paine, "is to argue with brutes." "Government", said George Washington, "is not reason, it is not eloquence, it is force." The framers of the Constitution saw freedom of the press as a crucial safeguard against abuse of government authority. James Madison, father of the first amendment, called freedom of the press "one of the great bulwarks of liberty." And Thomas Jefferson once said, "Were it left to me to decide whether we should have a Government without newspapers or newspapers without a government, I should not hesitate to prefer the latter." As President, Jefferson was pilloried mercilessly by a press far less responsible than the media of today. Although he occasionally castigated the press, he never abandoned his devotion to its freedom.

If the press has a strong case for a law to protect its sources, it does not seem that it has made the case forcefully to the public. Unless this is done, the chances of getting worthwhile legislation in this area will remain slim. Barring Congressional enactment of a bill like Senator Cranston's, or an unexpected reversal of field by the Supreme Court, there seems to be little likelihood that the conflict over the limits of journalistic freedom will soon die down.

All levels and branches of government believe they are acting in the public interest in seeking to require the testimony of newsmen. For their part, journalists believe they are upholding the fundamental democratic value of a free flow of information to the public. The determination of both sides is thus heightened by a feeling of righteousness. While some journalists may be able to resolve their individual conflicts over subpoenas with the authorities, this is a time of intense mutual suspicion between press and government. So there will very likely be many other cases in which neither side will budge. So far, most reporters don't seem to think the flow of news has been too seriously affected by the Caldwell decision. But after a few more newsmen—or their sources—are sent to jail because of it, the conviction among journalists is strong that there will be a lot the public will never know.

[Reprinted with permission of copyright owner, the *New York Times* Magazine and Brit Hume. All rights reserved.]

[From the *Columbia Journalism Review*, Sept./Oct. 1972]

BEYOND THE "CALDWELL" DECISION—"THERE MAY BE WORSE TO COME FROM THIS COURT"

By Norman E. Isaacs

The date was June 29, 1972—and while the countdown to 1984 stood at eleven years and six months, one had to reflect that George Orwell was, after all, author, not infallible seer. The Supreme Court of the United States, by 5 to 4 vote, ruled that the power of a grand jury took precedence over the heretofore presumed protections of the First Amendment. The Court held that Earl Caldwell of the *New York Times*, Paul Branzburg of the *Louisville Courier-Journal*, and Paul Pappas of WTEV-TV in New Bedford, Mass., had been without legal right in refusing to provide grand juries with confidential source data.

From the days of the great muckrakers, investigative reporting has depended on the ability to protect news sources. The drumfire of subpoenas which began in 1969 has threatened to drive away all types of confidential news sources. So it was that the cases of *Caldwell*, *Branzburg*, and *Pappas* had caught the attention of journalists across the country—or *seemed* to have caught it.

Caldwell's case was the most prominent and the one with sharpest definition. By hard work, Caldwell had gained sufficient confidence of Black Panthers and other black militants on the West Coast to do some outstanding reporting. Summoned to appear before a federal grand jury and to bring his notes and tape recordings of interviews, he refused to appear on the ground that even his entry into a grand jury room would destroy credibility with his sources. Although ruling that he had a first amendment right to protect his confidential data, the U.S. District Court held that he had to answer the subpoena. This decision was overruled by the Court of Appeals, which declared that the first amendment did indeed provide a qualified privilege to newsmen and that Caldwell had a right to refuse to appear.

Pappas had gained access to a Black Panther headquarters by agreeing to protect the confidences. The Bristol County, Mass., grand jury demanded to know who and what he had seen. He refused to tell, and his case went to the Supreme Judicial Court of Massachusetts, which ruled in the grand jury's favor.

The *Branzburg* case involved two episodes, one of which I was a part of as executive editor of the *Courier-Journal*. Branzburg reported that he had a chance to interview and get pictures of two young men synthesizing hashish from marijuana—if he could promise to keep their identities confidential. I told him to proceed, that we were willing to fight the case "right up to the top." The prosecutor subpoenaed him, Branzburg contended he was protected under the Kentucky reporters' privilege statute, but a state court held otherwise, and an appeal to the state's highest court was fruitless. In a second *Branzburg* case, he spent two weeks in Frankfort, the state capital, interviewing and observing drug users, and wrote about it. This time the Franklin County grand jury sought his testimony and, again, Branzburg lost at this level and on appeal.

The *Caldwell*, *Pappas*, and *Branzburg* cases were linked in the final appeal to the Supreme Court. In the majority decision, written by Justice Bryon R. White and supported by Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist, the Court held that "the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation." Citing many precedents, it said:

"These courts have . . . concluded that the first amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses. . . . We are asked . . . to grant a testimonial privilege that other citizens do not enjoy. This we decline to do."

There were two dissents. One by Justice William O. Douglas gave the press' side as forcefully as an editor has ever presented it:

"The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work. There is no higher function performed under our constitutional regime. . . . A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public will be ended. . . ."

The other dissent, written by Justice Potter Stewart, and supported by Justices William J. Brennan, Jr., and Thurgood Marshall, creates the dramatic effect of open debate between White and Stewart—and has the ring of the Holmes-Brandeis era. Justice Stewart wrote:

"The error in the Court's absolute rejection of first amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. . . . The Court's crabbed view of the first amendment reflects a disturbing insensitivity to the critical role of an independent press in our society [and] invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."

This thrust disturbed Justice Powell, who wrote a brief concurrence to the majority opinion, calling the decision one "of limited nature" and saying:

". . . we do not hold . . . that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government' . . . Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an apropriate protective order may be entered."

Stewart challenged the majority view of the grand jury process. Citing prior Court decisions upholding first amendment rights in legislative inquiries, he wrote:

"Surely, the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law."

He questioned the picture of a "grand inquest" and hammered at "the weak standards of relevance and materiality that apply during such inquiries." He argued that "under the guise of investigating crime, vindicative prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose."

That same day, another major, corollary decision affecting information flow held that Senator Mike Gravel could be questioned by a grand jury about the source of the copy of the Pentagon Papers that he had read, in part, into the *Congressional Record*. As Justice Brennan pointed out in a dissent the majority thus was ruling out the "informing function" of a member of Congress.

These cases and the Pentagon Papers decision of last year—which involved temporary prior restraint—leave adherents of a free press no reason to be sanguine. The best hope for protection of news sources now appears to lie in passage of federal and state "shield" laws.

Actually, the issue of a newsman's immunity is an old question [see "The Confidences Newsmen Must Keep," Nov./Dec., 1971]. The first statutory recognition was granted in Maryland in 1896 (and a 1939 amendment extended its protection to radio reporters). Eighteen other states now have shield laws, most limited largely to protecting reporters from having to identify news sources—all that a "Model Confidential Communications Statute" of Sigma Delta Chi, the journalistic society, called for until recently. Now, with the spate of subpoenas since 1969 and the Supreme Court's decision of June 29, the issue has broadened.

Immediately after the June 29 decision, Senator Alan Cranston introduced a bill providing that "a person connected with or employed by the news media or press cannot be required by a court, a legislature, or any administrative body to disclose before the Congress or any federal court or agency any information or the source of any information procured for publication or broadcast." Earlier, Rep. Edward I. Koch had introduced a bill to accord newsmen the privacy privilege of lawyers and clergymen. Rep. Ogden Reid also has proposed a bill to exempt newsmen from responding to subpoenas except in cases involving treason or a threat to life. To date, however, Congress has shown little disposition to take up any immunity measures, and ASNE counsel Richard M. Schmidt, Jr., who practices in Washington, reports little indication that more than a few congressmen are so moved now. "So many Congressmen and Senators are sore at the press," he said "that it's going to take a good deal to bring them around."

This appears to leave the next move up to the press. Stanford Smith, president of the American Newspaper Publishers Association, said the issue of a shield law had now taken "top priority" with ANPA. He said he planned to call a meeting of "all the news organizations" to get behind a single immunity bill they could support with enthusiasm. "If we splinter off into half a dozen differing versions," said Smith, "we'll never get anywhere."

The challenge is a considerable one. Justice White's majority opinion, at one point, said that Congress and the state legislatures are free to "determine whether a statutory newsman's privilege is necessary and desirable." Before he wrote that into his opinion, however, he used the judicial knife to slice the idea of a newsman's immunity privilege into bloody strips. He wrote:

"The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . The informative function asserted by representatives of the organized press . . . is also performed by lectures, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources, and that these sources will be silenced if he is forced to make disclosures before a grand jury. . . . [T]he courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws."

One cannot study this whole long passage in the majority opinion without recognizing that the Supreme Court is telling Congress that any newsman's immunity law has a hard way to go. Indeed, Justice White's opinion suggested that newsmen might be better advised to rely more on the Department of Justice's guidelines, which "may prove wholly sufficient to resolve the bulk of disagreements between press and federal officials."

There may be worse to come for the news media from this Court. The truncated news coverage [see box, page 22] did not focus on the implied threats in these passages, for example:

"Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."

Many newsmen may have forgotten it, but two members of the Court majority played key roles in the Reardon Report, which created such a noisy clash between bar and press in the late 1960s. Justice Powell was president of the American Bar Association when the Commission headed by Massachusetts Justice Paul Reardon was set in motion, and Chief Justice Burger was chairman of the parent group, the bar's Special Committee on Minimum Standards for Criminal Justice.

What all of this amounts to is that the American news media are in a much more serious situation than they seem to recognize. We are in a period of libertarian and journalistic repression, and the myopia of newsmen seems to prevent them from reporting the story in anything other than fragments and snippets. There is, of course, some editorial writing of high distinction, but in most of the country's newspapers it is eclipsed by disjointed coverage that relies on headlines and subordinates meaningful content. Tom Wicker had the focus when he wrote immediately after the subpoena decision:

"It may look good in the headlines that the Supreme Court has barred the death penalty as it is now administered in the United States; nevertheless this welcome but limited step ought not to deflect attention from the rest of what the Supreme Court unfortunately did this week. The Court significantly limited freedom of the press, for one thing, and for another, it put a rather effective choker on the Congressional channels by which the public might learn some things the executive branch does not want it to know. The cumulative effects of these decisions might well be more important than the death penalty ruling (except, of course, for the 600-odd persons on various Death Rows, who may not now be executed)."

In the eyes of some observers, Wicker is an advocacy journalist, but he is communicating the sweep of affairs and looking beyond the daily jigsaw exercise of setting type and placing it where it fits best.

The sound and fury of the political campaign is now on, and the press for the most part is caught up in what is being shouted from the hustings and disseminated by the pollsters. Underneath it all, the central fact is that the way America runs has changed dramatically. As Neil Sheehan pointed out in an article in the *Progressive*, the Executive Branch has become "a centralized state in the European sense of the word. [It] has become the state in America to all intents and purposes." Justice Douglas concluded his dissent in the subpoena case with essentially the same line of thinking:

"The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The first amendment, as I read it, was designed precisely to prevent that tragedy."

Not all of journalism has been myopic. Almost to the day a year earlier, the *Wall Street Journal's* extremely able observer of the Supreme Court, Louis Kohlmeier, cautioned the press about the elation being expressed over the Pentagon Papers decision. He called the elation "at best premature" and at worst possibly "downright wrong." Refering to the case as "a historic confrontation between the constitutional rights of a free press and the constitutional power of the President, he added:

"History suggests that when such rights and powers crash head on, press freedom isn't likely to win. . . . Moreover, the rather recent history of the newspaper business further suggests that the arguments for press freedom may not prove to be of iron strength if put to additional tests. . . .

"[The Government stressed that] the press is a commercial entity that doesn't always respect the principle of economic freedom, so why should the government respect press freedom? . . . The press may see no parallel. But Chief Justice Burger apparently did, when he rather sneeringly referred to the *Times*' claim to 'sole trusteeship . . . of its journalistic scoop.' "

Sketchy Coverage: Editors Propose, Copydesks Dispose

Considering the importance editors had attached to the cases, news coverage of the Supreme Court's June 29 decision was astonishingly casual. I checked many newspapers of June 29 and 30. In some there was no trace of the story. In scores of others, the account appeared on inside pages.

This was explainable in part. The same day the Court also had issued its ruling against capital punishment; President Nixon had held one of his infrequent news conferences; and the Democratic party's credentials committee had ruled against Senator George McGovern on seating the California delegation. Quite properly, the Associated Press and United Press International placed major emphasis on these stories, and almost all newspapers gave a bannerline to the death penalty decision and quoted extensively from the Justices' opinions. But the poor coverage of the subpoena cases once again demonstrated how slavishly telegraph and news editors follow wire-service presentations without question—of how news treatment is more a mechanical than a thoughtful process.

Neither wire service distinguished itself, though UPI had a slight edge. It issued a 500-word story with another approximately 750 words excerpted from the opinions. AP's main truck wire story ran 450 words, with an additional 360 words on the supplementary "B" wire.

As might be expected, the most intensive news coverage of the decision appeared in the two newspapers directly involved, the *New York Times* and *The Courier-Journal*. Both were serviced by their Washington bureaus. Curiously, in the field in which it had excelled for so many years—providing full or nearly full texts of important documents—the *Times* was not well balanced. Twenty paragraphs were given to Justice White's majority opinion; six to Justice Douglas' dissent; and only three paragraphs to Justice Stewart's. The *Times* reported statements by spokesmen for the American Society of Newspaper Editors and Sigma Delta Chi calling for a national shield law and disseminated this story on its own wire service. And both the *Times* and *Courier-Journal* followed with strong editorial comment.

Elsewhere, the most significant reporting and editorial attention was provided by the *Los Angeles Times*. Its June 30 edition had the story on page 1 with two full columns inside. On Sunday, July 2, the *Times* followed with an extremely strong 1,250-word editorial, reviewing and attacking Justice White's opinion and listing seven of its own major investigative stories which had relied heavily on data provided its reporters confidentially.

Considering where it is published, the size of its staff, and its resources, the *Washington Post* scored on the low side. Understandably, the *Post's* able Court specialist, John MacKenzie, had to concentrate on the death penalty decision first. So the *Post* fell back on a 400-word AP story for its early edition, then substituted a 20-inch MacKenzie story later, but presented no excerpts from the Court opinions. On July 1, the *Post's* editorial page published a vigorous 1,000-word editorial titled THE 'NIXON COURT' AND THE FIRST AMENDMENT with a 390-word digest of Justice Stewart's dissent.

The *Boston Globe* carried a page 1 bold-type reference to the subpoena story, and the *Globe* bureau account—approximately 15 inches long—appeared on page

21. No further mention could be found in subsequent issues. In the *Denver Post*, the Supreme Court ruling (UPI) received 12 inches of space and no editorial comment could be traced, but the Sunday *Post* devoted more than a full page to columnist Robert D. Novak's critique of "advocacy journalism." The news editors of the *Charlotte* N.C., *Observer* decided the subpoena story was worth 12 inches on page 10 (which turned out to be in keeping with the editorial July 3 describing the decision as knocking "a sliver from the bulwark that has separated the press and government for 200 years").

When one gets into qualitative and quantitative appraisals, questions arise automatically. Granted that space pressures on newsdesks during the 24-hour cycle were extreme, one would think that at least a few newspapers would have asked the wire services for followup stories for subsequent days. But H. L. Stevenson, vice president and editor of UPI, and Rene Cappon, AP's managing editor, report that they received no inquiry from any point in the country. After checking, Cappon expressed chagrin over the paucity of AP's coverage. "While you're distributing cuffs," he said, "throw one in our direction."

Cappon's candor is refreshing, but the gnawing question remains: What happens inside newsrooms that lets such a story slide into cursory insignificance?

It seems clear that newspaper and broadcast newsmen (who handled this story with even less competence than the average newspaper) reacted similarly—not to the essential story, but to their own technologies. In spite of talk of changed patterns, there are countless demonstrations that newspaper desk staffs remain chained to the mythology of "yesterday" and "today" stories. Not only do editors and news editors not operate on the same thought planes, but newsdesks and Sunday departments too often seem to occupy different planets. The Pavlovian response for countless deskmen seemed to be that the Supreme Court decision on the Messrs. Caldwell, Branzburg, and Pappas lived and died on the June 29–30 news cycle. To have followed on Sunday, July 2, when space was available, with a full summary and adequate quotations from the opinions would have required some mental gear-switching that, for all the brave talk by editors, obviously is not yet part of the new journalism.

Still other concerns arise when one appraises the editorials following the Court's decision. One of the oldest newspaper fundamentals is that readers should be exposed to full and adequate news reports before editorials are published. In many of the newspapers checked, the editorials, of necessity, went beyond anything that appeared in news stories. From this arises yet another question: How can editors write meaningful comment when they have had no opportunity to read and weigh the full opinions? I began discussing the subpoena decision with editors on June 30. Of fourteen editors I talked with on July 7–12, only four had read the full opinions.

This, in turn raises the issue of competent interpretation. And here we must record the discomfiting thought that the great majority of editors have no one to whom to turn for pertinent discussions of first amendment philosophy. Only a handful of communications lawyers have evidenced either commitment or skill in first amendment matters. For the most part, newspapers' legal representatives are specialists in corporate and tax law—men who are defensive about issues posed by investigative reporting (how many reporters have heard the remark, "That's libelous. We can't pass that"?) and who are either remote from, or uninterested in, the confidentiality concerns of reporters and editors. It is not insignificant that only last year, in the confrontation over publication of the Pentagon Papers, the *New York Times* found it necessary to employ as its counsel Prof. Alexander M. Bickel of Yale.

In view of hearings conducted by Senator Sam J. Ervin's Subcommittee on Constitutional Rights, one would have expected much more pertinent discussion of a proposal that may be the press' salvation—a federal "shield" law. The Court examined the subject in detail and there was a "news peg" immediately when Senator Alan Cranston introduced a reporter's privilege bill in the Senate and several Congressmen requested action on bills introduced earlier. Again, except in the *New York Times*, this aspect was treated casually and erratically.

The most significant words of that day, Kohlmeier pointed out, might have been those of Justice Blackmun, who said: The first amendment, after all, is only one part of an entire Constitution." Two weeks later, in a longer look, Kohlmeier wrote that the Pentagon Papers decision had merely concluded one battle in a continuing war:

"The Republicans and Democrats are aware that whoever wins the election next year will in all probability name the successors to eighty-five-year-old Justice

Black and seventy-two-year-old Justice Douglas, and thus win control of the court. The winner who controls the court will in the end decide the control of the press issue, because the court and the press are forever wedded to one another by the first amendment."

Things, of course, moved faster than anyone then anticipated and Mr. Nixon had the opportunity to replace Justices Black and Harlan with Powell and Rehnquist. Justice Douglas turned seventy-four in August, and he carries a heartpacer, and there are recurrent doubts about Justice Marshall's health, if Mr. Nixon is reelected, his options are obvious. Given a six- or seven-justice majority, a Nixon Court can apply a straitjacket that can inhibit, if not immobilize, news coverage for a generation, if not longer.

In the meantime, there is one certain test ahead for the press—and beyond that possibly the biggest challenge of all. The certain test is whether an immunity law can pass Congress. There are several factors to consider. One is the makeup of the next Congress. If there is a major surge in Republican strength, chances will be diminished, considering the general Administration view. If Mr. Nixon is still President, there is also the possibility he might veto legislation on the subject, using as a basis Justice White's admonitions of the difficulties. Obviously, no matter how gloomy the outlook, the effort must be made, and it will be instructive to learn whether the press can mount the same kind of energy and pressure that produced the Failing Newspaper Act—about which Senator Philip Hart said, "The lobbying which went on . . . may well have set new records."

The possible challenge beyond this has to do with the "continuing battle" Kohlmeier mentioned. Historically, the press has warred with government, but there has been nothing to match the relentless intimidation and continuing heavy shelling by the Nixon Administration. No matter what the subject, the Administration's press agentry divisions maneuver with skill and imagination to make the press always a target. If it is the SST, Mr. Agner's multiple warhead is aimed not only at Democratic senators but also at the *New York Times* for supposedly spearheading a general media drive; if it has to do with bank bombings, a Federal Reserve spokesman sprayguns freedom of the press, claiming it permits the dissemination of lies to incite people to illegal attack; if it has to do with Defense Department appropriations, General Bruce Holloway spreads a napalm attack on "the vast amount of information over television and other instant news media that, one way or another, is a disservice to the security of the country."

When it is not attack, it is surveillance and counterthrust. Senator Ervin may charge Executive Branch members with "stupidity or duplicity" in ordering the investigation of Daniel Schorr, the TV newsman; it will be denied, but another department (the FBI) will dip into the private records of Neil Sheehan and his wife. Public television will convince Congress it cannot plan adequately with less than a two-year appropriation; the Executive Branch will veto it.

"Only an emergency can justify repression," wrote the great Louis Brandeis. The question is whether this Administration is determined to create that kind of emergency about the press. Of course, the first amendment reads, "Congress shall make no law . . . abridging the freedom . . . of the press." But in a changed era, with the balance of governmental power in the hands of a determined Executive Branch, and supported by a judiciary sharing the same philosophy, what is to stop the appointment of a Presidential Commission to oversee the news media in the proclaimed interest of protecting the people's "freedoms"—a protection from the taint of what Presidential aide Patrick Buchanan called the news media's "monopoly of ideas," which he said may require "antitrust-type action."

Many newsmen will hoot at this as hysteria. To paraphrase what was once said said about Westbrook Pegler: They may be able to write, but can they read? Did they read, for instance, when Solicitor General Erwin Griswold argued in the Pentagon Papers case that it was inherent in the Presidential power to abrogate or abridge the right to publication when the President considered it necessary in the national interest? News people are superb on reporting polls, but have they read the returns that keep emphasizing the public is very close to the "tipping point" in its attitudes about the press? That the public is close to the "tipping point" about many other institutions in the society is small comfort. The press remains the foundation stone. As Justice Douglas said, "there is no higher function . . . under our constitutional regime."

There is still time for journalism to clean up the nest before 1984 comes. But it won't be cleaned up by blustering definance of the political sharpshooters. It can be cleaned by insisting on an end to the silly and careless errors that plague almost all newspapers and give readers ample reason to disbelieve anything they read. It can be cleaned by newsmen shedding the cloak of arrogance which both protects the incompetents and rejects even constructive criticism. It can be cleaned by owners giving editors the right to use the newsprint required when news demands it. It can be cleaned by editors moving to reclaim newsroom power from the deskmen so adept at "getting out the paper" but so often inept when it comes to grasping true meaning, or in understanding when and how to follow through. These few fundamentals are far from enough, but just hewing to them might help win back the trust of the American public. Without that trust, journalism runs the risk of winding up as an unwilling servant to Big Brother.

[Copyright © 1973, *Columbia Journalism Review*. All rights reserved.]

[From the *Charlotte Observer*, Mar. 18, 1973]

SHIELD LAWS CAN BE RISKY—FIRST AMENDMENT PROTESTS BEST

(By John S. Knight)

Can a reporter be compelled by government to reveal the identity of confidential sources of information, or the content of unpublished information?

Most newspaper editors and the television networks say "No," since Article I of the Bill of Rights specifically states: "Congress shall make no law . . . abridging the freedom . . . of speech, or of the press . . ."

Yet the Supreme Court decided last June by a five to four vote in the *Caldwell* case that the sources of a reporter's information are not and cannot be held confidential.

The *Caldwell* decision has given rise to any number of state and local judicial actions which have held reporters in contempt of court for refusing to disclose confidential information to grand juries. Several newsmen have been jailed, and the subpoena process is currently being applied against the *Washington Post* in the Watergate case.

Members of the Fourth Estate, well aware of the Nixon Administration's hostility toward the press, are pressing Congress to enact a shield law which will protect the reporter's position of confidentiality. Some 18 state legislatures have already passed laws which provide some form of protection. Similar bills have been before the Congress since 1929, but as Senator Sam J. Ervin Jr., says, "To write legislation balancing the two great public interests of a free press and the seeking of justice is no easy task."

ERVIN SEES IT TWO WAYS

Senator Ervin, an authority on constitutional law, who has been attempting to draft legislation to protect the free flow of information, finds it a bothersome assignment indeed.

On the one hand, Ervin declaims, "there is society's interest in being informed—in learning of crime, corruption or mismanagement. On the other, we have the pursuit of truth in the courtroom. It is the duty of every man to give testimony. The sixth amendment specifically gives a criminal defendant the right to confront the witness against him, and to have compulsory process for obtaining witnesses in his favor."

Yet we find a separate concurring opinion by Supreme Court Justice Lewis Powell a statement that the Court may not in the future turn deaf ears upon newsmen if the government can be shown to have harassed the newsmen, or has otherwise not acted in good faith in the conduct of its investigation or inquiry.

But Justice Byron R. White, writing for the majority, stated: "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the fifth amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the first amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."

The net effect of the Court's decision in the *Caldwell* case was to leave it to the Congress to determine the desirability and the necessity for statutory protection for newsmen. And that is where we are now.

CONGRESS CAN TAMPER WITH LAW

For one, I confess to some ambivalence on this question. Can Senator Ervin draft a law which, as he says, "Will accommodate both the interest of society in preserving a free flow of information to the public?"

Or, will the enactment of any law—qualified or unqualified—invite Congress to tamper with the law as it serves its pleasure in the future? Vermont Royster of the *Wall Street Journal* sees "boobytraps" in this procedure, since "for what one Congress can give, another can take away, and once it is conceded that Congress can legislate about the press no man can know where it might end."

The mood of the press is quite understandable. For here we have the Nixon Administration's palace guard—a grim and humorless lot—in a posture of open hostility to the press and attempting to hinder the free flow of information with every device available to them.

We also have the courts, "traditionally unhappy" as Senator Ervin says, "about evidentiary privileges which limit judicial access to information, and by and large refusing to recognize a common-law right of reporters not to identify sources or to disclose confidential information."

So the key question remains: Will the press and the public interest best be served a Congressional shield law holding confidentiality to be violate—a law which, as Royster points out, could be changed and diluted by a future Congress?

Or had we better stick with the first amendment under which a free press has survived for nearly 200 years without any law to make newsmen a class apart? Why not stand with the courageous history of the press, and continue to wage battle against all attempts at censorship by the courts and intimidation by a hostile administration?

PRESS MUST DEFEND CONVICTIONS

Senator Ervin now thinks he has devised a third-draft bill which "strikes a reasonable balance between necessary, if at times, competing objectives." Yet what Congress gives, Congress can take away. Neither the Senator nor the proponents of any protective law for journalists address themselves to this crucial point.

The more I study this question, the more I am persuaded that since the first amendment has nurtured the freest press of any nation, reporters, editors and publishers should not be petitioning Congress but rather continue to contest all erosions of press or public freedom and be prepared to defend their convictions at any cost.

Our precious freedom of speech and publication are guaranteed by the Bill of Rights which has served us well throughout our history. Freedom is not something that can be assured by transitory legislation, worthy as the intent may be.

When Congress is involved, there lies the risk—as Royster had said—that it might start legislating about the freedom of the press even in the guise of protecting it. This could be a dangerous precedent.

I readily concede that what I have written above represents a modification of what I had previously believed, and that it is open to challenge from my journalistic colleagues who hold a contrary view.

Before the press potentates pursue too enthusiastically the case for a shield law, they would be well advised to ask themselves whether the remedy they propose will ultimately sustain, or destroy, a press freedom.

[From the *Manchester Union Leader*, Jan. 20, 1973]

"A SHIELD FOR LIARS"

(By William Loeb)

Newspapermen are not any better than anybody else. There is absolutely no reason why they should be granted any special privileges under a so-called "shield law." This publisher is really ashamed of the representatives of the printed as well as the electronic media in New Hampshire and all across the country who are clamoring for special privileges to which they are not entitled and which are not needed.

No good newspaperman who tells someone that he is going to keep confidential the information received would reveal that information to a casual inquirer. However, he has a duty—as does any other citizen—when a duly appointed representative of society, such as a judge, district attorney, or grand jury, says, "We believe the information you have will be helpful to us in doing justice or solving a crime," and that duty is to cooperate with the authorities.

The idea that there is something special about newspaper reporters or representatives of a radio or TV station is not only absurd but also is typical of the arrogance that many members of the communications media, both printed and electronic, display toward the public. They have gotten themselves into a frame of mind where they seem to feel that they are better than the rest of the people. In fact, there is some doubt as to whether we are as good or as honest.

Take the situation right here in New Hampshire. Suppose a government official were to leak confidential information that he shouldn't be leaking to a newsman. In an endeavor to try to determine who has been responsible for the leak, an investigating committee is set up and they call a newsman before them. Under the so-called "shield law," he could tell them it's none of their business.

Under those circumstances, the state or city official who was guilty of wrongdoing in this case would never be punished.

In short, contrary to what the proponents of the "shield law" say, the "shield law" could be used not to increase the information available to the public but rather to prevent the public and the duly constituted authorities from obtaining information to which they are entitled and which they need.

Getting right down to the nitty-gritty, let's look at the present uproar over the violation of the confidentiality of the Business Profits Tax records. The person guilty of that violation is not the duly authorized representative of the governor.

The guilty person is the person who violated the confidentiality of these records by giving the information to the newspapers.

If New Hampshire had a "shield law" and this newsman was called before the investigating committee, he could fall back on the "shield law" and say, "I won't tell you," and we would never know the truth. The citizens of New Hampshire and the duly appointed authorities would never be able to determine what official of state government committed the crime of giving away this confidential information to the press.

A Shield Law for newspapermen is nothing but an invitation to mendacity. It would be the most convenient way a reporter could ever have of lying and not being caught in his lie.

The members of the electronic media and the printed media who have been besieging Concord with requests for a Shield Law are, in the estimation of this newspaper, a bunch of egotistical crybabies. They have precisely the same duty that any other American citizen has—to cooperate with the courts, the district attorneys and the grand juries in supplying any information that would help in solving a crime or in providing justice in the courtroom.

[From *Human Events*, Feb. 24, 1973]

LET'S TAKE A CLOSER LOOK AT "SHIELD LAWS"

(By Clark Mollenhoff)

I am reluctant to support any legislation to change, modify or clarify the 1st amendment protection of the United States Constitution with regard to freedom of the press.

In the first place, it is impossible to define or limit those covered by the "freedom . . . of the press" clause without doing serious violence to the full meaning of the Constitution. It is not for the protection of the big newspapers and magazines and broadcasting only, but must include the weakest, poorest-financed pamphleteer regardless of beliefs.

This leads to the second point which nearly everyone mentions in proposing "shield" laws. How can it be written so it covers only "newsmen" entitled to protect their "confidential sources" and eliminates the possibility of its use by extremist groups or gangsters as a cover for illegal operations? It should be obvious that any restriction in coverage would be likely to eliminate the pamphleteer, who probably needs protection more than any of the better-financed groups. The underworld would have no problem in financing a newspaper that could meet any standards set in a shield law.

Thirdly, if reporters and editors are only reasonably competent, responsible and understanding of their job, they do not need shield laws to be effective in exposing government corruption and mismanagement or repressive measures.

I have been working as an investigative reporter for more than 30 years and that experience has involved a broad and varied use of "confidential sources." It has involved exposure of scandals from the Polk County, Iowa, courthouse to the White House and essentially every type of city, county, state, or federal agency.

I have always protected my "confidential sources," and in only a few instances have been even faced with a choice of whether to reveal the source or risk contempt. The crisis never did materialize.

It is seldom that the crisis does materialize for the thinking reporters and editors who use some sense of responsibility in entering into "confidential" relationships with their sources and the manner in which the information is used.

My experience indicates that it is seldom that responsible editors and reporters need a shield law, and it could hardly be argued that the irresponsible press needs further encouragement. It is the irresponsibility of a few that makes the press vulnerable to the criticism that destroys public confidence.

There is a great deal of sympathy for public officials who are subjected to probably false attacks by other politicians or by the press. The public reactions against "smears" by the political critics or by the press is a proper reaction, and the last thing we need today is a law that could be a further invitation to irresponsibility.

It is a serious business to charge political figures with corruption, mismanagement or to otherwise reflect upon their integrity or competence. Certainly, it is also a serious business to consider clothing the press with a near total immunity that is comparable only to the immunity that members of the House and Senate enjoy in connection with remarks made in Congress.

Hardly a year goes by that we do not see some examples of what for the last 20 years has become known as "McCarthyism" by some member of the Senate or House. We have seen and we have probably deplored the abuse of the constitutional provision that no member of the House or Senate shall be "questioned in any other place" for "any speech or debate in either house."

To pass some of the broader shield laws suggested would in fact clothe all publishers, editors, reporters, columnists and commentators with the same immunity that senators and representatives enjoy to fire charges at public officials on the basis of anonymous "confidential informants."

We should ask ourselves if we really believe that all publishers, editors, reporters and commentators are that much better in their motivations and that much more responsible than the members of the Senate and House we have criticized for "McCarthyism."

We should ask ourselves if an invitation to more irresponsibility is the medicine the press needs in addition to the United States Supreme Court decision in the case of *New York times* vs. *Sullivan* that frees us from libel responsibility in all except those instances involving provable malice.

This decision certainly gives all the protection the press needs to cover its unintentional errors and even sloppiness associated with meeting daily deadlines. And the United States Supreme Court in speaking on the Pentagon Papers case gave an added dimension to the news media's right to publish the contents of government papers carrying the highest national security classifications.

The prosecution of Daniel Ellsberg for "leaking" the Pentagon Papers is another problem since he identified himself as the source, and the government through other evidence had pretty well established his identity even before he made the admissions.

It is an irresponsible reporter who writes a story on the uncorroborated statements of a so-called "confidential source," and it is an irresponsible editor who does not insist upon such corroboration as a test of the truth or falsity of the confidential information.

A few unrelated arrests of reporters for failing to reveal "confidential sources" have resulted in a near hysterical atmosphere in which it is quite likely that legislators may be pressured into passing unwise laws.

I say unwise laws because I fear in the long run shield laws could become the instrumentality for a government control of the press.

That danger comes in the demands of a large number of legislators for a definition of "legitimate newsmen" and "legitimate news media" to be shielded from disclosure of confidential sources. Once the defintion is drawn some person or group of persons will have to be empowered to determined who are "legitimate newsmen" and what are "legitimate news media."

Obviously that power must vest in some entity selected by the press, the public or the government. Certainly a public election of those with this power has innumerable hazards, and who in the press would or should be trusted with this authority over his colleagues.

Any government role in naming or selecting the men to make the decision as to who are "legitimate newsmen" has the major drawback of permitting government to have "a little control" over the press.

The Standing Committee of Correspondents is the group that would come closest to being an objective committee, and present standards this group uses certainly would bring complaints from the extremist pamphleteers and propagandists who would undoubtedly be excluded from the definition of "legitimate newsmen."

The broadcasting industry is rightfully concerned that the so-called "fairness doctrine" will be used by this Administration or some later Administration as a vehicle for exerting a government control of radio and television licenses. The speech by Dr. Clay Whitehead gives some concept of the attitude of the Nixon Administration and how it might seek to use the "fairness doctrine" lever against those in the broadcasting industry who displease the Administration.

It is not wise to underestimate the ability of government lawyers to twist and distort almost any law into authority for withholding documents that the executive branch wants to keep secret.

We have seen the Nixon Administration's recent expansion of the claims of "executive privilege" to the point it is blocking Congress, the press, the public and even the General Accounting Office (GAO) auditors from important information on government operations and on the expenditures of tax money.

We have seen how the bureaucrats, often with White House approval, have even twisted the exceptions to the Freedom of Information Act to justify withholding documents from the press and the public. The Freedom of Information Act was passed only a little more than six years ago for the specific purpose of assuring a maximum free access to government information. The exceptions to the act have been expanded and distorted by misinterpretation by government lawyers into a law to suppress information.

It went to the ludicrous extreme where the Office of Economic Opportunity (OEO) and the AID agency refused to reveal such basic biographical information on employes as place of birth, schools attended, and prior places of employment. The refusal was justified by government lawyers on grounds that the Freedom of Information Act authorizes the withholding of personnel records as confidential.

Those of us who were active in amending the so-called "housekeeping statute" (5 U.S.C. 22) recognize the great capacity of the bureaucrats for interpreting any law to provide a justification for nondisclosure of information.

In that case, a law that was written to provide for the custory and preservation of government records had through a series of interpretations by the various attorneys general been turned into the most widely quoted grounds for withholding documents.

How are we to assure that a shield law that is written for the protection of the "confidential sources" of legitimate newsmen will not be turned around and used as an instrument of government control?

As I set out the reasons the press should be wary about a shield law, I do not wish to give the impression that I am downgrading the value of "confidential sources." As one who has availed myself of information from such "confidential sources," I know such informants are indispensable in our efforts to expose and correct the dishonesty and unfair practices that creep into every government agency from time to time.

My coolness to a shield law is based upon my belief that skillful use of information from confidential sources will usually leave no hint that the original tips came from confidential sources. The full protection of the confidential sources requires that the reporter and his editors handle the information in such a manner that there is no direct or indirect clue as to the source.

Deadlines and the need for a "scoop" are never justifications for failing to check out the information that comes from a confidential source. If the reporter has a true confidential relationship with his source the responsibility is not merely to not use his name, but to in every way possible avoid giving any indication of the identity of the source.

If a thorough job is done of corroborating the informant's story, the story itself need not indicate that it came from a confidential informant.

Over the centuries the only universally recognized confidential relationships have been those of doctor and patient, lawyer and client, husband and wife, and priest and confesser. In each of these four relationships the confidentiality is required for the benefit of the person making the disclosure—the patient, the client, and the confesser and, in theory at least, for the mutual benefit of husband and wife.

In each of those confidential relationships the area of confidentiality protected is carefully circumscribed, and specifically exempted are some statements made in the presence of other parties or information that is to be passed on to third persons.

The major beneficiaries of a newspaper informant's statement that is confidential are the reporter and his newspaper, not the informant.

The question that puts the whole thing in perspective involves the question of what the newspaper would do if a story from a confidential source resulted in a substantial libel suit against the newspaper. Would the newspaper, with its economic base threatened, permit its reporter to remain silent on a confidential source who might be the key to whether the newspaper had acted responsibly or irresponsibly?

It would be difficult to justify using a shield law to protect a reporter's confidential source in a criminal contempt action while refusing to permit the same reporter to protect those sources in a civil libel action against his newspaper, its publisher, or editors.

Finally, it is my deep belief that this is, and must be, a nation guided by laws, and not a nation guided by the whims of any man who is temporarily in charge of government or any group of men who are in a position to control public opinion. All men have a responsibility under our laws and our Constitution to give testimony in civil and criminal proceedings and to produce relevant records.

Prof. James Wigmore in his celebrated treatise on evidence declared that "the public . . . has a right to every man's evidence," including that of "a person occupying at the moment the office of chief executive."

"His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice." Prof. Wigmore wrote.

Chief Justice John Marshall in *United States* vs. *Burr* held that "a subpoena may issue to the President" and that the "accused is entitled to it of course . . . whatever difference may exist with respect to the power to compel the same obedience to the process."

In a letter responding to the subpoena, President Jefferson acknowledged the obligation of the chief executive to give testimony, but said he could not journey to Richmond for the *Burr* trial. However, it was noted that he would be available in Washington for the taking of a deposition.

The press properly criticizes the President for his expansion of the claim of "executive privilege" in a manner that makes his entire White House staff unaccountable to the Congress and to the courts.

It is illogical for the press to assail President Nixon for the power grabs inherent in his expansion of the claim of "executive privilege" at the same time that some segments are asking the Congress for a near total immunity from the process of grand juries, the courts and Congress.

I believe that law enforcement officials should be restrained in the use of subpoenas to compel newsmen to testify or produce records, and should not do it if there is any other alternative. There is a danger of its being used as a tool of harassment against an aggressive press, but the facts will usually speak for themselves in such cases.

The 1st amendment guarantees of freedom of speech, freedom of press and freedom of assembly have served us well. Our Supreme Court has wisely ruled that radio and television are equally protected by the 1st Amendment, but has rejected expansion to protect reporters' "confidential sources" up to this point.

I have no doubt that the Supreme Court will come up with a protection for "confidential sources" when the fact situation makes it apparent that prosecutors and law enforcement officials are using their power of subpoena to harass and intimidate the press.

In the meantime, the press would do well to be more discriminating and more thoughtful about the cases it pushes in court and the principles that those cases represent. It is well to remember the legal maxim that "bad cases make bad law."

We have shield laws on the books in a number of states providing us laboratories for continuous study of the problems encountered in their administration and enforcement. We should ask ourselves if we are interested in practical solutions, or are we interested in flashy stunting in front of a grandstand.

If we criticize an administration for sloganeering that we characterize as superficial, slick and deceptive gimmickry from the advertising world, we have a greater obligation not to be caught up with equally superficial efforts to make the cry of "freedom of the press" cover all of our sins. The need for a "scoop" is never a justification for rushing to press and failing to corroborate a confidential informant.

While I always feel a degree of sympathy for men who are jailed, I have always found it a good idea to examine the facts in each case before suggesting sweeping changes in the laws.

The banker who is imprisoned for embezzling funds may have been only engaging in the pursuit of his profession of making money in a manner that he regarded as more efficient. I am sure that there is a great deal of sympathy for the imprisoned bankers within the banking community. Yet few would argue that the laws on embezzlement should be changed to encourage the free enterprise system.

Every profession has its renegades. There are doctors, lawyers, bankers and even journalists who deserve to be in jail. Every journalist who shouts "confidential source" and "freedom of the press" is not a John Peter Zenger or Elijah Parish Lovejoy. I am sure that there have been occasions when a so-called "confidential source" was a non-source, and there have been some journalists who have been little more than arms of the underworld.

These are just a few of the things one should keep in mind in determining whether we really need a shield law, and whether it would promote the responsible journalism that is our greatest need today.

[Reprinted with permission of copyright owner, *Human Events*.]

[From the *Detroit News*, Feb. 18, 1973]

A Reader Urges the Press—Let's Name These Nameless 'informed sources'

(By Charles W. Pryor)

In the rising tide of resentment against what has been represented as suppression of free speech, the communications media has been guilty of creating a tempest in a teapot. Most of this controversy evolves around the implication that the press' right to publish is being regulated.

Bosh, I say. Each day of my life I have found the press taking and keeping more liberties and freedoms than the day before. The press has more freedom today than it had yesterday, and it will have tomorrow. That cannot be denied.

The news media, television included, is afflcted with a persecution complex bordering on paranoia. While this is true of the entire television industry, it does not necessarily include all newspapers. Here and there, thank God, there are a few daily publications that try to rationalize the dispute and put it in its proper perspective. The remaining lot is in a state of severe mental shock.

One can imagine this group, on the hour, donning a three-corner hat and racing down the halls of their hallowed establishments shouting "Repression is upon us." Well, let me tell you this: repression is not even close. The hot breath they feel on their necks is that of the government but of a disenchanted public.

If a conflict exists, it is between the press and the public, and, if the press is in trouble, it is because they have been inviting trouble. The habit of some editors to print vague and tendentious news stories has been the primary contributor to this credibility gap between the press and the reader. How many news stories begin with the phrase, "According to an informed source?" How many political stories are credited to, "a White House spokesman" or "an inside advisor?" How many news events have partisan statements credited to, "an observer" or "a reliable source?" Plenty!

My question is, Who are all these people, anyway? Who are all these nameless, faceless anonyms that are making our history and shaping our society? If the press is so concerned with my right to know, how come they don't tell me? Not all newspapers are guilty of this wiley, evasive type of reporting, but there are enough of them spread across the country to constitute a real threat to the "honest truth."

Television newscasters are no exception. News items beginning, "according to one high official," are not uncommon, and in some cases a 22-minute broadcast contains more unsubstantiated news than documented fact.

It is not so much what editors say that disturbs me, it is what they fail to say. Michael Harrington and William F. Buckley, Jr. are biased and they would be the first to admit it. But how about a staff editorial dealing with social and political news. Should an editor be selective in his judgment? Should he include innuendoes and half-truths in his comments? Of course not. But some do. And how about an editorial based on one statement taken out of context? It happens every day!

Everybody wants freedom for themselves and regulation for everyone else. "There ought to be a law" is a common growl, but it always applies to the other person.

It is ironic, but true, that that part of the extreme liberal press that is the most vociferous in its demands for more freedom to publish, is also the most vehement in its demands that more restrictions be placed on the individual. And it is even more ironic that, by failing to criticize some of the far left precepts, they are inadvertently moving us closer to the "Big Brother' 'type of government they so violently loathe.

There is another phoniness associated with this segment of the press. In order to escape taking sides in a controversial issue (that may be morally right but socially unpopular), they will most often suggest that the issue be placed in the courts "where they belong" and where justice will prevail." Their editorials usually are heavily salted with lofty phrases depicting the fairness and equity of these esteemed judicial bodies.

But let some court declare that a reporter must cough up all the knowledge he has of a particular case so that "justice will prevail" and they take a directly opposite view and lament that the courts are suppressing the rights of the people. One can only surmise that the courts are correct only when they agree with these flip-flop artists.

All indications are, that what certain misguided defendants of individual liberties are pointing for, is a news atmosphere, whereby the press and television will remain above criticism—free to operate without any restrictions and not bound by any code of professional ethics.

These same people are the ones most fond of quoting the first amendment and its freedom of the press statute. The First Amendment guarantees freedom of the press but it does not state that the press must be truthful. Vice-President Agnew, when he blasted the print and electronic news mediums, never said that news should be restricted or controlled. He merely said that it should be fair—and there's nothing wrong with that. The media however, using its best redherring tactics, quickly turned it into a charge of repression.

More recently, White House aide Clay T. Whitehead has come in for a few bumps on the head for his proposal of broadcast regulations. Yet he makes no mention of restricting the flow of news.

Neither does he proscribe to any limitation of what may be said or shown on the screen. He only demands that the medium reinstate that old-fashioned precept of fairness and stop slanting the news. Whitehead wants the networks to present both sides of a controversial issue. Fat chance he has.

The American people want fair and truthful reporting. They want courageous and determined editors who are not afraid to name people and take sides on social and political issues. They want television and newspapers to expose deception and skulduggery, but they do not want, the media to engage in these same practices under the pretense of enlightenment.

[From *Judicature*: The Journal of the American Judicature Society, Editorial]

QUIS CUSTODIET CUSTODES?

The press has recently come into conflict with the courts as a result of demands that newsmen reveal confidential information or sources of information. A Los Angeles reporter went to jail on November 27 for refusing to identify the source of of information he had published regarding the *Manson* trial. More recently, a reporter was jailed in Washington for refusing to produce tape recordings sought by a defendant in a criminal action arising out of the Watergate incident.

Last June the United States Supreme Court ruled that a newsman has no first amendment right to refuse to testify when called before a grand jury (*Branzburg v. Hayes*, 408 U.S. 665 (1972)). The 5-4 majority dwelt heavily on the well-established obligation of all citizens to appear before a grand jury and answer questions relevant to a criminal investigation, and it declined to make an exception for newsmen. Justices Douglas and Stewart, in vigorous dissents, argued that this would endanger the public's right to know, and would hamper the administration of justice. Justice Douglas held out for an absolute right of a journalist not to appear before a grand jury at all, and if he does appear voluntarily, to decline to answer specific questions on first amendment grounds.

In a concurring opinion, Justice Powell tempered the firm stand of the majority by observing that the holding does not deprive newsmen of all constitutional rights, and that if the newsman "is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and an appropriate protective order may be entered." Justice Powell maintained that the asserted claim to privilege should be judged on its facts by striking a balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct, and that this should be done on a case-by-case basis in accord with "the tried and traditional way of adjudicating such questions." Justice White, speaking for the majority, considered this possibility and dismissed it as presenting practical and conceptual difficulties of a high order, and said the Court was unwilling to "embark the judiciary on a long and difficult journey to such an uncertain destination."

A reading of the 87 pages of the four *Branzburg* opinions along with the current news dispatches makes clear that there is no easy answer to this newest problem in bar-press relations. The Court's majority has reason to question the wisdom of Justice Douglas' broad-brush application of this newly-claimed privilege, especially when the need for it is to be left entirely to the subjective determination of the newsman himself. At the same time, there are sound reasons for sharing the concern of the media and others that freedom of the press not be eroded away by governmental restrictions, including judicial restrictions.

Justice Stewart suggested that the *Branzburg* ruling would harm the administration of justice by depriving law enforcement agencies not only of the specific information being sought but broad general information relating to controversial social problems. On the other hand Justice White observed that if it is indeed true that law enforcement cannot hope to gain, and may suffer, from subpoenaing newsmen before grand juries, "prosecutors with be loath to risk so much for so little." He cited "Guidelines for Subpoenas in the News Media" issued in a recent U.S. Department of Justice memo:

"The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of first amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice." The Guidelines go on to say: "The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." The Guidelines provide for negotiations with the press as a part of the process.

The *Branzburg* decision makes no change in the law. For centuries all citizens, with only a few narrow, closely-guarded exceptions, have had an obligation to appear before a grand jury and answer questions. The Supreme Court declined to make another exception for newsmen, although it acknowledged the existence of a trend in that direction. The opinion lists 17 states which now provide some type of statutory protection of a newsman's confidential sources, and similar legislation has been introduced many times in Congress.

The courts and the press are partners in combating crime and in making democracy work. When the newsmen's leads uncover information important to the administration of justice, they should not want to withhold it; but if disclosing it would dry up the source of important additional information, law enforcement officers should not want it disclosed. Here is an area tailor-made for high-minded cooperation between the two. If trust and cooperation exist, there should be no problem. The problem arises when mutual trust and cooperation are less than perfect and someone has to have the final word.

The net effect of the *Branzburg* decision is that the courts will continue to have the final word. The dissenting justices, and the newsmen who have gone to jail rather than tell, are saying that the newsman himself should have the last word. Ultimately it comes down to the question of whom we trust the most. A free press is a watchdog over all institutions, including those of government itself, and those who insist upon the newsman's exemption are really saying that they feel safer trusting the press than trusting the government, or, more specifically, the courts. But—*quis custodiet ipsos custodes*—who will watch the watchdog?

[Reprinted with permission of copyright owner, *Judicature* Magazine.]

[From the *New York Times*, February 1973]

THE GOVERNMENT AND THE PRESS

(By James Reston)

WASHINGTON, Feb. 10—At some point, Oliver Wendell Holmes or some other philosophic after-dinner speaker must have said that there was more to life than the law, and this may be what the courts have overlooked by trying to compel newsmen to disclose the sources of their information and turn over their notes to the legal authorities.

In its 5-to-4 decision in the *Caldwell* case, the majority of the Supreme Court said: "These courts have . . . concluded that the first amendment interest asserted by the newsmen was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses . . . . We are asked . . . to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."

So this is now the law, but it leaves out of account some of the practical problems of life. The Supreme Court majority opinion seems to rest on two assumptions: first, that newsmen keep notes that make sense to anybody but themselves, and second, that reporters would rather disclose their sources than go to jail.

Have you ever seen a reporter's notes? Would any serious judge really accept most of them in evidence? They are a jumble of phrases, home-made shorthand, disconnected words, names, wisecracks by press-table companions, lunch dates, doodles, descriptions of somebody's necktie or expression, and large and apparently significant numbers, probably reminding the reporter of nothing more than his next deadline.

This is not quite as casual or irresponsible as it sounds. By his notes, the reporter is sending signals to himself. For a few hours, he knows what the squiggles on his paper mean. By putting them there, he puts them in his mind. Ask him a week later what they mean, and he'd probably be totally lost.

There are exceptions, of course. The British correspondents in Washington, unlike their American colleagues, were trained in shorthand. Their notes of an interview could undoubtedly be translated into an accurate account of what happened, worthy of evidence in a court of justice.

But no American judge, even with the wisdom of Holmes or Brandeis, or the experience of Chief Justice Burger, who grew up with one of the most remarkable generations of American journalists in Minnesota—Hedley Donovan, the editor of *Time*, Eric Sevareid of C.B.S., Phil Potter of *The Baltimore Sun*, Dick Wilson of the Cowles papers, and many others—could possibly figure out the mysteries or reporters' notes, even with the help of all the cryptographers in the Republic.

On the question of going to jail rather than disclosing the sources of information, the chances are that the journalists' tradition of keeping promises, of being faithful to the people who have faith in them, will probably prevail long after the present Administration and the present controversy over the first amendment have passed.

The democratic tradition hasn't gone on for over 200 years in this country for nothing. There are still a lot of people in government here who will insist on telling the truth, even if they are hounded out of Washington for doing so, and most reporters will go to jail rather than squeal on them because they were faithful to the larger interests of the nation.

Besides, jail for serious reporters, trying to investigate the corruption of power, in either party, is not the worst thing that can happen to them. There is so much corruption, and they chase it under such unequal circumstances, even to the point of physical exhaustion, that many of them would almost welcome a little relief from the tyranny of the deadline to think and read even in the pokey.

Besides, the White House and the courts, in this controversy with the press and the television and radio networks over the last couple of years, have made their point and won most of the battles. They have created an atmosphere of anxiety, if not fear, among the Washington civil servants, who are the real source of information in this city. The Nixon Administration lost the Pentagon papers case in the Federal District Court, but won it in the Supreme Court and lost the Watergate bugging case in the Federal District Court, but it won the *Caldwell* case, and the word has gone out to the civil servants and the press to be very careful about talking too much or exposing too much. And this is probably the signal the Administration wanted to get over in the first place.

But American life and tradition are still too strong to be overwhelmed by intimidation of the civil servants or orders by the Supreme Court to hand over all the information reporters possess about their sources and in their notes. The reporters won't break their promises to their sources, even if they have to go to jail, and most of them won't turn over their notes, though it would be a puzzle to the judges and the juries if they actually did.

[From the *New York Times* Magazine, Feb. 11, 1973]

THE PRESS NEEDS A SLOGAN—"SAVE THE FIRST AMENDMENT!"

(By A. M. Rosenthal)

A press-Government confrontation, a good, sound have-at-each-other, is hardly new in the United States. There must have been a President sometime, even a Borough President, who never denounced the press and felt brotherly toward it, but his name does not come to mind. But there is now a direct engagement between press and Government—but not just between press and Government—taking place in this country, day in and day out, with increasing intensity, that does involve something new and touches the meaning, nature and balance of our society. What is new is that the executive branch of Government for the first time has been using the courts, as an ally, a weapon and a lever against the press to try to prevent it from performing its duties.

What is also quite important is that the Government has been able to win support or acquiescence of a good part of the public in its totally determined crusade against the press. At least two things have brought this about.

One is the failure of the press, largely through an overdose of timid self-consciousness, to present plainly a struggle in which it finds itself embroiled. Most Old Journalists are quite shy about situations affecting them—"stay out of the story"—and hideously embarrassed about speaking up for themselves for fear of being accused of conflict of interest.

The other is the skill of the Government and its spokesmen in presenting the issues they see as important and div[illegible]g attention from the others. As the Government presents the case, the issues [illegible] these:

The press is often biased and inaccurate and therefore has lost its credibility. The press resents criticism and considers itself immune to it. The press is demanding a special privilege of confidentiality of sources that it often denies others and that can obstruct justice and hamper the chosen representatives of the people in carrying out their responsibilities. It's we and they—the Government acting for the people on one side and the press, alone, on the other.

All of these changes often are lumped together—but it is important to separate them and examine them individually. Because one is a matter of opinion—credibility. Another is a matter of fact—immunity from criticism. And the most important—confidentiality—is a matter of law, the Constitution and the philosophy and administration of government.

So far even the most acid of official critics of the printed press have not suggested that the issue of press credibility is one that can be determined by court verdict, administrative fiat or standardization.

(I met Vice President Agnew only once and he thought James Reston was the Managing Editor. Otherwise he was entirely charming and told me he had been covered by many Times reporters and had no complaint against any of them; before I could open my mouth to say that sure was not the way it came out when he made those speeches, he was out of the room.)

Press credibility is a matter of conscience and judgment and there is no point ducking that reality—the conscience of the members of the press, the judgment of the public and of history. I'm quite sure that even Mr. Agnew would agree that any attempt to establish norms of credibility could only be made through the destruction of any semblance of the free press.

It could only be made by devising and imposing governmental standards as to what is fair and not fair, what is true and not true, what is objective and what is not, what is careful and what is slipshod. Many modern leaders, from Lenin to Marcos of the Philippines, have decided that standardization of credibility is indeed a handy way to get a little peace and quiet and makes for a delightful simplicity in government.

Even in our own society we have this in important part. We have the phenomenon of civil servants and politically appointed officials telling television and radio, two of the most important news distributors, what's fair and what's not fair, and using the whip of licensing renewal to enforce conformity with Government news standards. My own belief is that this is unconstitutional, and it is sad to see the printed press being so bland about the growing incursion into the freedom of the electronic press and never seeming to hear that tolling bell.

Certainly television and radio news broadcasts are press within the meaning of the first amendment, but our society has accepted grievous pressures on electronic press freedom simply because it cannot yet figure a way out of the technological problem—not foreseen by the writers of the Constitution—that there are a limited number of airwaves and channels. Some day cable TV or another breakthrough will vastly open up the number of channels, but will the freedom of the electronic press be restored? History is not full of examples of forfeited freedoms regained.

But so far nobody in Government has proposed legal standardization of the printed press. So whether or not the press deserves credibility is a matter of opinion, and the last time I looked we were still free to have opinions about this.

Certainly the press is in trouble with the public. I don't need any polls to tell me that; all I need is a watch. Every time I walk into a party I look at my watch to see how long it will be before somebody starts slamming the press. Average time: 2 minutes, 42 seconds.

But after the guests have finished roughing up the press, they go after the universities, the kids, the military, the Mayor, the President, the Congress, the Supreme Court, the church. Even the environmentalists are getting their lumps at parties these days.

That's the point. This is the Iconoclastic Age. The performance of every single institution in American life is being re-examined as never before, and although it does lead to a certain paranoia and although too many normally intelligent people see conspiracies everywhere and nobody seems to trust anybody's motives anymore, all told it's not too bad an age in which to live.

So the press, too, is being examined more critically than ever before, internally and externally. Yes, yes, yes, there is much to criticize. In a way, although I detest constructive criticism as much as the next man, the criticism is a mark of how much store the public does set by a free press. We are expected to be all-knowing, all-saying, infallible, and Heaven help us where we are not.

Obviously, I will not defend every story in every paper, including *The Times*. But, for the moment, I will leave the recital of our sins to the press critics. There are plenty of them; press criticism is an industry second only to oil in the United States.

But neither is it a time to hide behind the newspaperman's constant fear of being too defensive. Most of us are so long trained in avoiding conflicts of interest and even the appearance of partiality that we have abandoned the credibility issue to our oppoents. There is this to say: never before in the history of this country or any other has the press in its totality conveyed as much valid information to so many people, never has there been a corps of journalists as determined to dig and keep digging.

The rather pleasant paradox is that the more inquiring the press gets the more it will be criticized. For one thing, more toes will be stepped on and that will get more people mad. For another, the more that is revealed the more will be the demand for further effort on the part of the press. If you want to be loved, don't be a dentist and don't be a newspaperman.

The issue of press credibility can be answered at least in part by a question. Take any important reality—Vietnam, corruption, crime, governmental and business ethics, race, feminism—and ask whether what the public really knows came from the decisions of officialdom to reveal it or the daily attempts of the press to go beyond officialdom. Ask whether the public learns more from Ronald Ziegler or any first-rate Washington correspondent, and you face the key issue of credibility.

The Government's complaint that the press considers itself immune to criticism is a faintly comical issue and I believe the Government knows it. There is no other institution in American life as deliberately open to criticism as the press. With almost a masochistic fervor it prints columns of attacks upon itself by its opponents. Many of us correct our errors in public when we find them and since our existence depends on belief in our good faith, the press is in constant communication with—almost constant pursuit of—every group in the community. We talk a lot but we sure do listen a lot.

What other institution in American life opens itself to criticism as does the press? When was the last time that a government—on any level—turned over its mimeograph machines and briefing sessions to its critics? When did the Government Printing Office issue a pamphlet devoted to the critics of Government departments? When did General Motors put out a press release carrying a speech by Ralph Nader? When did any civic group, or political organization left or right, turn over the equivalent of its news columns to its detractors, voluntarily?

Not only is Mr. Agnew free to criticize the press but the press is almost frantically eager to record his latest kick in the pants. But the Vice President and his colleagues in Government are not critics of the press at all.

They are critics of those stories or journals or writers not entirely to their taste. They make sweeping rabble-rousing charges and seek to arouse not critical examination but anger and hatred. When Clay Whitehead, the White House's current antipress fright-mask, was asked for examples to back up his charges that network television was guilty of passing on "élitist gossip" and "ideological plugola," he demurely refused to get involved in specifics. He considered it proper to slander newcasters but not to provide evidence. Press criticism is one thing and demagoguery another, but the public dignifies the latter by considering it the former.

There is indeed an issue of credibility, and it is painful to say that it is really an issue of Government credibility. We have come to the point, sorrowfully, where we really do *expect* our Government to tell the whole truth or even a goodly part of it, whether it be about My Lai, Watergate, the Paris peace talks, military overruns or who told General Lavelle to do what. We have come to the point where we *expect*, if not outright falsehood, then at least obscurity, double-talk, cover-up and euphemistic jargon from American officialdom. We have to remind ourselves that this time a government branch may be telling the whole truth, and how sad that is.

This is truly a serious matter. To understand it fully, consider the nature of news. The press reports, investigates, asks questions, seeks out the opinion of dissidents on any given issue.

But a large part of what appears in the press does come from government. It is the obligation of the press to examine what government says but it is also the obligation of the press to tell the public what the government is saying.

News is like sausage—a lot of meaty ingredients go in one end of the machine and come out, it is hoped, as a clean and useful product at the other. But to the extent that information from the Government is one of the ingredients, we cannot be sure that what is going into the sausage is wholesome, untainted and unadulterated, and that is where newspaper people more and more often see the true credibility problem.

But we can live with governmental casualness about truth even though we don't like it. As for criticism, even demagogic, the press is not made of snow and will not melt away if the Government attacks it, even unfairly. We can write and print, and if we do our job properly the press will survive Mr. Agnew's distaste for it.

Nor does a free press necessarily depend on total public admiration. Sometimes the press is ahead of the public—like those Southern reporters and editors who saw the race issue before their own communities were ready to face it and the correspondents who forced the public to recognize what was taking place in Vietnam. Sometimes it is behind the public, and just about every day it prints things that gets readers mad. Always has, always will.

It is not simply the Administration in Washington that uses demagoguery against the press. The attacks from the left and the so-called revolutionary movement are quite as constant, quite as distorted, quite as politically motivated. If they can't control the "establishment press," they can at least try to damage its reputation.

(For a tightly organized, favor-trading, pressuring, make-a-buck, knife-sticking lobby that considers fairness a poor joke, there is nothing quite as busy as the anti-Establishment establishment of the left. Since that quite prosperous establishment realizes fully that the easiest way to get attention and a dollar is to attack the press, the viciousness of its polemics generally makes Mr. Agnew and Mr. Whitehead sound like executives of the American Newspaper Publishers Association. Unlike Mr. Agnew and Mr. Whitehead, the anti-Establishment establishment depends entirely on public attention. Ignored, it simply and quite astonishingly passes from consciousness and virtually ceases to exist.)

But the maintenance of any kind of freedom does depend on conditions for exercising that freedom and on recognizing the signals that they are endangered. If the conditions for exercising freedom do not exist, constitutional guarantees become a mockery of reality. In case anybody has any doubts about this, let him read the constitutional provisions guaranteeing various freedoms in Communist societies. They read just fine.

Freedom of the press depends on a reasonable degree of access to information and on confidentiality of news sources, and they go together. Without them you have only freedom to print speeches and handouts and that's not a freedom worth talking about.

Both access and confidentiality are now being threatened, and that is the basic issue as newspapermen and newspaperwomen see it. It is not an issue simply between Government and the press. It is also an issue between the Government and the public. The question to be determined is whether the press can function in its role as a conveyor of meaningful information to the public.

Access is being threatened by an obsessiveness in Government about secrecy to a degree unknown in our history. And access is also being threatened by a series of court decisions tending to destroy a reporter's ability to keep confidential his confidential sources and confidential information. As the result of the *Caldwell* decision in the Supreme Court, four newsmen already have gone to jail on the confidentiality issue; others face that prospect and there is serious question as to whether the press will be able to function as it has in the past, not simply in the investigation of wrongdoing but in inquiry into Government process.

Obviously, the concern is not about access to what the Government wants to tell the public. No problem about that—the press not only has access to that but the Government has instant, nationwide access to the public to let its position be known. What this is all about is information the Government would prefer not to become public at a particular moment—or at all—for a variety of reasons. The Government may believe the information might damage its negotiations at a given point. Or it may be that the Government simply feels that information would put it in a bad light and Governments are not keen on showing themselves in bad lights.

There are often real conflicts involved and Governmental interests are not always merely self-protective. Few people would dispute the right of a Government to try as best it can to keep certain things secret—military movements, ongoing intelligence operations in the field and some of the confidences of other Governments, for instance.

But the meaning of the first amendment is that Government judgments—including judgments about what should be made public—can be contested by the exercise of a free press. So we get down to those most difficult but most important elements in society—attitude and judgment—attitude and judgment of Government, of the press, of the public.

The assumption of most Americans would be that it is the obligation of Government to keep as few things secret as possible and for as short a length of time. Then honest people might argue about whether this piece of information or that should have been published—in living rooms, not courtrooms.

An editor is often asked, "But who elected you to decide that your judgment is better than that of the Secretary of State?" The answer that seemed so simple when the Constitution was written now seems rather difficult for many people to swallow.

The same Constitution that "elected" the President gave the press the right to examine his actions and contest his judgments and those of his servants. I believe also that the constitutional rights also imposed an ethical obligation on the press to use the right decently and in the public interest but it very carefully and purposefully did not set standards for either decency or public interest.

My colleagues and I edit the news columns of The *New York Times* and we have our ideas about what the standards of The Times should be. But I would not want to impose those standards on The *Berkeley Barb*. The strength of the American press is in its diversity and not its conformity. Standards will be in dispute but the fact that they are in dispute should reinforce the importance of the constitutional right rather than serve to wither it.

In any case, that is not the heart issue. Instead of keeping as little secret for as short a time as possible, our recent Governments have adopted an attitude of keeping as much as possible secret for as long as possible. It is not just secrecy that is the isue but the attitude toward it. Secrecy has become something not to be avoided whenever possible but to be imposed whenever possible—and that strikes me as a violation of the trust imposed in Government by the people.

The simplest way to keep things secret is to mark them secret and then lock them away and impose punishment upon any who reveal them to the public. There are thousands of people in all branches of Government authorized to lock whatever they wish away from the public and millions of documents lie hidden, some of them decades old.

The fuss about the Pentagon Papers theoretically inspired the Government to take a new and more lenient look at its classification system. It may be new, but the leniency is hard to discern. An important part of post-World War II history is still locked up, even though the participants may be dead or out of power. Keeping them hidden serves only the convenience or prestige of governments in general.

Still locked up and denied to the press and public are documents having to do with the Korean war, the Bay of Pigs, what Khrushchev told Kennedy at Vienna, State Department assessments of a speech by Khrushchev on wars of national liberation and its bearing on American policy, and thousands of other important documents.

The whole classification policy is designed at least as much to keep information from the American public as from potential enemies and this has been acknowledged by many Government officials, past and present. Arthur Schlesinger in a recent speech said that the "secrecy system has become much less a means by which Government protects national security than a means by which Government safeguards its reputation, dissembles its purposes, buries its mistakes, manipulates its citizens, maximizes its power and corrupts itself." And all this is done not by Congressional or public decision but simply by administrative fiat.

Most Americans, I assume, would agree that it is wrong and dangerous for our Governments to conceal historic information, although recent Governments—not just Mr. Nixon's—have been doing exactly that. That's the easy part to agree with.

But what about ongoing matters, really current matters? Are we to say that it's O.K. to tell Americans what happened 15 years ago that might have led to a prolonged war but not exactly why the war was prolonged after "peace at hand"? Myself, I would a lot rather know what may affect the country today and tomorrow than what was significant yesterday and last year.

Here, too, an obsessiveness about secrecy has built up through several recent Administrations. It has become a way of life, an end in itself, a virtue. And like all obsessions, it sometimes so seizes its victims that they do not even know they are suffering from it.

The Pentagon Papers. More than anything else, they showed how deeply secrecy had become a pattern of living in our Government, simply accepted as an assumption as so many other assumptions were accepted.

The Papers show clearly that one Administration after another carried itself and the country into a constantly escalating series of wars: a political war against the Geneva accords of 1954, a counterinsurgency war, a land war, an air war, a mass land war, the greatest bombing war in history. And the Pentagon Papers show that each step was taken because the Government knew the preceding step had failed. Yet the public never knew that each step had failed.

But the Papers show no indication at all that the various Governments of the United States ever even seriously considered telling the public the full truth, not even as an academic matter. If the Governments of the day had been more open, is it not at least conceivable that history might have changed, that public attitudes, fears and desires might have legitimately been taken into account and policy therefore modified?

Whatever truth the public came to know about Vietnam came largely from the press. But these pieces of information and insights provided by the press were constantly being attacked and denied by Government—falisification added to secrecy.

We have now a Government that did not invent secrecy as a way of life but has happily adopted and built upon it. It was the first Government to impose prior restraint upon the press and although it failed in the end to suppress the Papers, it established a precedent with which we will live in danger forever. It seems to be arguing, in the *Ellsberg-Russo* case, that the Government owns information and that distributing it against Government wishes can be a crime.

It has used the power of subpoena to try to force newspapermen to reveal their sources of confidential information, an attempt to damage the press by making it serve as an investigative arm of Government. It has wrapped up the entire diplomatic process in executive privilege more tightly than before by making a Presidential assistant rather than the Secretary of State responsible, thus cutting off Congressional inquiries. Secretaries of State, like Presidential assistants, can testify only with Presidential approval, but tradition and budgetary dependency make Cabinet Secretaries more inclined to want to show up. And when Mr. Rogers does appear, Congressmen must always wonder whether they couldn't have learned a lot more from direct examination of Dr. Kissinger.

At the very least, the price of Government secrecy in some matters should be credibility and openness in most. The Government has not paid the price. The public was mislead about our attitude toward India—not the anonunced neutrality but the private tilt. The public still does not know the full story about the Lavelle case and how high it reached, and rarely in American history has an Administration so completely turned off information and coldly declined a sense of accountability on an issue of peace or war as in the days between "peace at hand" and the renewed bombing of Hanoi. Peace was achieved, but the Administration has tried with some effectiveness to prevent the public from finding out whether it really could have been achieved at least a few months earlier.

Now diplomats dearly love secrecy. I covered foreign affairs and diplomacy for 18 years and I really do not believe a great deal was served by secrecy. I do believe most was gained by exposure, even though there may have been momentary embarrassments. Foreign policy is a matter of lives and death. It should be understood by the people. In order to understand it and make judgments, the public must understand not only the end results but as much as possible of the negotiation process—the options open and the reason why some were taken and others foreclosed.

There is no great hope that obsessive Government secrecy will suddenly diminish. The public considers war too important for generals but it has not yet grasped the idea that diplomacy may really be too important to be left so completely within the power of diplomats or even the President to determine what should be known and not known. It has not come to grips with the whole question of accountability for diplomacy and foreign policy.

It is precisely because of the secrecy mania, precisely because so much is hidden or obscured, that the press must be even more determined than ever.

I do not believe every scrap of foreign-policy information must be printed. I do believe that it is the obligation of the press to inquire as deeply and broadly as possible, to print what it considers relevant information, to give the citizenry a clear idea of what is taking place.

That is why the whole question of confidentiality of news sources, always fundamental to a free press, becomes even more important. If a Government operates in an atmosphere of secrecy, pertinent information must come from those willing to risk the Government's wrath.

The greater the secrecy, the greater the risk and the greater the importance of the confidential source. This is quite different from the authorized, anonymous, highly placed source Government or officials use when they want information leaked without attribution.

The nature of the sources depends on the nature of the story, of course. On a police story it can be a patrolman or a detective who tells the reporter something because he is mad at his superiors or he thinks the public is being had. There are confidential sources in the military, officers who are not convinced of the total wisdom, let us say, of the Joint Chiefs. There are confidential sources in Wall Street, in sports, in the Black Panthers, in the theater, in the press, in political parties—just about everywhere of diplomacy. Often they are dissidents in the sense that they disagree with a policy or an order to keep it secret. Even a three-star general or a career ambassador can be a dissident at one time or another.

Confidential sources share some things in common. They do not wish to be identified either out of fear of legal or administrative punishment or public opprobrium. And they trust the reporter to keep their identity secret and keep confidential certain information that might be used to track his sources, or they have until now.

The confidentiality of new sources is regarded by every newspaperman as an absolutely indispensable tool in getting news that goes beyond Government handouts. And until recently it was taken for granted that the reporter could guarantee confidentiality. Now he can do so only if he promises himself and his sources as a matter of journalistic ethics that he will go to jail rather than destroy the confidentiality that is vital to the free press. Most reporters and editors believe they are willing to go to jail if need be.

Some have gone to jail and others may—for refusal to identify sources or reveal information given in confidence. But perhaps our society is asking too much, not simply of the reporter and editor but of the dissident—whether in the Police Department or State Department. We now ask the dissident to trust the newspaperman to defy the courts and go to jail rather than to break faith.

There are at least two cases where news organizations have decided to drop a story because they felt they could no longer guarantee confidentiality of source or confidential information. Some reporters—fortunately, just a few—will not ask certain questions or put themselves in situations where they think they may come under direct court pressure to reveal sources or information and there are reporters who are destroying files and notes and tapes important to future research.

But generally speaking, reporters and editors seem to be proceeding as usual, having taken the decision to fight in the courts if necessary and to go to jail if necessary. Nobody can say what will happen if the arrest of newspapermen for protecting confidentiality becomes an accepted part of the American scene. Four cases are bad enough. Forty or a hundred, if the legislators and the public permit the courts to get away with it, could entirely change the nature of reporting in this country.

But even if every reporter in the country were willing to go to jail, it would not solve the confidentiality problem. There is the impact on the sources to be considered. Some sources who normally would have given important information to the press have changed their minds. They would in the past have been willing to accept the reporter's word of honor. They are considerably less willing to do so now that they know that the price of that word of honor may be an indeterminate jail sentence for the newspaperman.

We will never know what this loss of confidentiality of sources will cost because we will never know what we might have known. It seems entirely plain that the destruction of confidentiality of news sources will have an impact on how much the public knows about every aspect of public affairs. There will simply be fewer and fewer people in Government and out of Government willing to take the risk that the press will be able to protect them. It will not all happen tomorrow but it will happen as long as this country is ready to say that the price of dissidence is exposure.

In theory, a reporter can only be subpoenaed where there is an inquiry involving some crime that has taken place—and wouldn't that protect most sources since most stories have nothing to do with crimes?

When a Government wants to find out the identity of a source, particularly a source within the bureaucracy, it can become wonderfully imaginative in the use of Federal attorneys, grand juries and indictments. Our Government has not had a great deal of experience with this, since the *Caldwell* case is relatively new, but it has shown itself a quick student, as grand-jury subpoenas in the Pentagon Papers case have shown.

The issue has spread far beyond the Federal level. Judges and local district attorneys all over the country have taken the *Caldwell* case as a kind of hunting license to go after reporters on a wide variety of cases, all of them having nothing at all to do with national security. The potential impact on virtually every kind of serious reporting is a nightmare for journalists everywhere.

The Reports Committee for Freedom of the Press already has listed 19 cases that it considers attempts by the courts to require news reporters to disclose the source or content of confidential or other unpublished information. The list also includes three attempts to get this kind of information from reporters by the use of legislative or executive subpoenas and seven attempts by the courts to enjoin reporting of public proceedings.

After the Reporters Committee compiled its list, the Government established a new category of legal action against the press, one that most newspapermen had never really thought any Administration would try to get away with. That was the arrest— complete with handcuffs—of a newspaperman for physically holding documents taken from the Government.

On Jan. 31, Lesile H. Whitten Jr., a reporter who works with Jack Anderson, was helping an American Indian load documents in a car, documents that had been taken from the Bureau of Indian Affairs but which were being returned to the Bureau. He was arrested and charged not with stealing the documents, but with receiving and possessing them.

The plain fact is that there is not a good newspaperman in the country who at one time or another had not in his possession documentation from Government files. Sometimes it is given to him by dissidents, sometimes by officials who want to leak a story. If the *Whitten* case becomes a precedent, they will have to build new jails for the press, and any reporter who doesn't want to occupy a cell will have to run like mad from almost anybody in Government who wants to give him documentation for a story.

If confidentiality of news sources is really destroyed, it will mean that the press will be virtually dominated by the official version of what is taking place in American society wherever it touches upon Government and that means just about everywhere—in the bureaucracy, the military, the judiciary, the police, the expenditure of funds, and on all levels of government.

Officialdom will be able to present its version, as always. Its access to the press will be unaffected. But elbowed out entirely will be those who need access most—people with something to reveal but not powerful enought to reveal it with their name-tags on it.

The issue of press confidentiality is approaching a crisis point. The solution rests first in the public's understanding of its own involvement—that when important information is withheld or made inaccessible, it is being withheld not only from the press, but from the people who read it, see it or listen to it. With public understanding, and only with public understanding, the essential second step can be taken—state and Federal laws to protect the newspaperman from court orders to reveal his sources.

This is not a matter of special privilege for newspapermen but for the First Amendment. You can't tell a carpenter he is free to practice his trade as long as he uses no tools. You can't tell a newspaperman that he has a free press as long as he does not use his tools and among them the essential tool is confidentiality of sources.

An editor in Boston, not overly given to drama, gave me a bumper sticker that summed up in four words just how important some of us think this: "Save the First Amendment." If I had a car, I would stick it on.

(Reprinted with permission of copyright owner, *The New York Times* Magazine, and A. M. Rosenthal. All rights reserved.)

[From the *Wall Street Journal*, Feb. 28, 1973]

THINKING THINGS OVER

(By Vermont Royster)

DUBIOUS SHIELD

When a heretic—or maybe agnostic is a better word—arises in the congregation the most he can hope for is charity. So I hope the good nature of my peers will incline them to some degree of indulgence toward human frailty.

In this case my peers are those journalistic colleagues who clamor for special laws to shield reporters from having to testify in court about the sources of their information, and their name is legion. They include the officers of the American Society of Newspaper Editors, of the American Newspaper Publishers' Association, the editors of great newspapers and a long list of distinguished commentators in the newspapers and on radio and television.

The frailty is that having spent a lifetime in the press, and being devoted to its cause, I find myself beset by doubts as to the wisdom of these claims to special privilege from the obligations that rest on other citizens.

This is not to deny the provocations. Having maintained the Republic for some 200 years, and the freedom of the press, without the issue every arising, we have recently seen much harassment of reporters by prosecutors, grand juries and judges to no visible purpose other than to do discourage them from looking into dark corners. Some newsmen have been clapped into jail by irritated judges. Most of it has been no more than badgering, and as such has contributed nothing to the public polity.

Against this sort of thing there should be a protest, not only from the press but from the public. The doubts arise only as to the remedy proposed. And these suggest at least some cautions if Congress is going to try to erect a legislative shield around newsmen.

Caution number one: Whom will the law apply to?

Freedom of the press, as enbodied in our first amendment, belongs to everybody, not just to reporters for the *Wall Street Journal* or the *New York Times*. It is simply a special case of the generalized freedom of speech, protected by the same amendment, which belongs to every citizen. Thus the freedom of the press belongs to anybody with a mimeograph machine or access to a press, or even a writer of letters, for that matter. There is no licensing of newsmen; anybody who says he is one, is one.

So if this proposed law creates a blanket shield to permit any newsman to decline to testify before grand juries or in courts, then anyone—even a member of the Mafia—could hide behind it. The possibilities of abuse from such a blanket privilege should be obvious.

But if the law tries to escape this dilemma by defining who is a bona-fide newsman and so entitled to the protection of the shield, then the government is deciding who is a newsman and who isn't. The result of this, if it were held Constitutional at all, would be to narrow, not enlarge, the freedom of the press. It would be tantamount to government licensing of reporters, which I presume the American Society of Newspaper Editors would find as abhorrent as I do.

Caution number two: If the law gives newsmen (bona-fide or otherwise) an unlimited privilege of refusing to testify about information they may have, will this contribute to the better administration of justice?

Basic to our system of justice is the right of an accused to confront his accusers and to know all of the evidence for or against him, and also the right of society to have access to all the information about possible crimes against society. Suppose you were an accused and a newsman (bona-fide or otherwise) declined to testify about information that would help you, would you think justice done?

Even so great a defender of the press as Senator Sam Ervin has found this a sticking point in drafting a bill. He has felt compelled to make exceptions but, as he concedes, the making of them taxes the wisdom of Solomon. "I've never been able to draw a bill," he remarks, "entirely satisfactory to myself."

Caution number three: Information from anonymous sources may or may not be true.

The anonymous source has its virtues and it has provided the lead for many an exposure of malefactions, much to the public good. But anonymity is also a handy cloak for rumor, hearsay, gossip and slander. To give a blanket shield to it, applicable in every case, is to open a Pandora's box of evils. A dishonest reporter—and sadly there are some—could even pretend to sources he did not have.

One of the fundamental tenets of this curious business we call the press is our belief in the public's right to know. Doesn't the public's right to know mean the right to know all the facts available? Certainly it seems odd for newsmen professing that principle to say the public has no right to know what they would conceal.

There are other boobytraps in all this, it seems to me, both for newsmen and the public. For the press itself, there is a risk of having Congress start legislating about the freedom of the press even in the guise of protecting it. This could be a dangerous precedent, for what one Congress can give another can take away, and once it is conceded that Congress can legislate about the press no man can know where it might end.

For the public, the doubts are equally pressing. In argument for this newsman's privilege the analogy is sometimes drawn with the priest-confessor or the lawyer-client privilege, but there is a vital difference. The priest and lawyer are bound by total silence; they may not claim the privilege while proclaiming the confessional. This newsman's privilege asks something else, the right to proclaim anything and answer nothing.

This is a privilege granted no one else. Every other citizen having knowledge of crimes or misdemeanors, save only if he is himself accused, is obligated to answer before grand juries, courts of law or even in many cases before congressional inquiries on penalty of going to jail if he refuses. And a nagging doubt persists that it is going public policy to create a class of citizens immune by reason of occupation.

It is true there's no excuse for the harassment of newsmen, for using reporters in vague "fishing expeditions," and when it is done there should be a clamor everywhere. And we in the press, as you can see, are hardly powerless to raise such a clamor as to be heard far and wide.

But we have the first amendment, and I think in the long run it will suffice. At any rate our free press has survived these 200 years without any law to make newsmen a class apart, and I suspect it will survive without our claiming privileges denied to other men.

Beyond the *Caldwell* Decision—"The Decision is Tentative"

(By Benno C. Schmidt, Jr.)

For a little less than a decade, journalism and law have shared a common struggle to accommodate traditional procedures and principles to the development of widespread disenchantment and disobedience in American society. Numerous political, racial, and cultural groups have committed themselves to political or personal goals which they believe transcend the traditional obligations of citizens in a democratic society. While the rhetoric is often more apocalyptic than the action, there is no denying the social importance of these alienated groups. Whether the cause has been the rights of racial minorities, resistance to the draft, protest against the war, or exploration of different levels of consciousness, many groups—both organized and spontaneous—have advocated and often acted in disregard of law. Other traditional sources of authority, such as family, schools, or church, have been vigorously challenged. The media, as readers of the *Review* need not be reminded, have not escaped this distrust.

The *Caldwell* decision, encompassing three cases joined together for adjudication, is a microcosm of the difficulties of both journalism and law in responding to the alienation of many groups in this country. It is an intersection of journalism and law of the sort which, with disquieting frequency in recent years, has come to be viewed as a collision between competing interests. The idea that the interests of journalism and law are naturally antithetical, in this instance or any other, is ominous. Of course, much error and injustice are done in the name of law, just as much that is tawdry and worse is accomplished by reporters and the media. There will always be conflicts when either journalism or law offers a short-sighted view of its real interests. But thoughtful persons in each profession must make the effort to understand and accommodate the legitimate interests of the other. What, in brief, are the legitimate social interests of journalism and our legal system as exemplified in *Caldwell*?

Knowledge must be available about dissident groups before social institutions can respond to them in a rational and principled way. Disregarding any issues of justification concerning these groups' rhetoric or actions—issues of great variety about which there is ample room for disagreement—most persons would agree that decisionmakers at all levels have both underestimated and misunderstood the disenchantment which exists in many quarters. Whatever disagreements we might have about dealing with alienation and disenchantment are academic until we have access to information. For this knowledge we must depend on the individual efforts of journalists who try to penetrate the suspicion and hostility of protest and underground groups. These efforts will be substantially impeded if the reporter's subjects feel that anything he learns will become available to those social institutions to which they are opposed.

The difficulties of covering important protest groups should not be exaggerated. Few significant dissident groups are interested solely in being let alone. Most embrace a responsibility to reform society at large, and thus find useful whatever media attention they can attract. Conflicts between suspicion of the media and the desire to propagate information through it have resulted in individual reporters' being given knowledge on condition that other information or the identity of certain sources not be divulged. Journalists always have made use of promises of confidentiality in probing beneath the surface of press handouts, outright lies, and self-serving secrecy. But my impression is that the use of confidentiality in digging out stories is now more extensive than ever. Certainly, to the extent that the practice is a condition for coverage of disenchanted groups in our society, it has greater social value than ever before.

On the other hand, the legal system has important interests at stake in overcoming promises of confidentiality when they stand in the way of prompt and accurate detection and prosecution of crimes. The grand juries which subpoenaed the three reporters involved in the *Caldwell* decision occupy a traditional and important place in law enforcement. It has long been the proud boast of Anglo-American law that no person is too high to escape the obligation of testifying to a grand jury. This unlimited obligation is an important guarantee of equality in the operation of criminal law. Thus, courts have historically been unsympathetic to claims that certain kinds of information should be privileged from disclosure before the grand jury. Only the privilege against self-incrimnation and the attorney-client privilege have achieved general recognition from the courts of the U.S.

In *Caldwell*, the Supreme Court was presented with a collision between the interests of journalistic freedom—interests accorded a constitutional dimension by the first amendment—and the fundamental social interest in enforcement of the criminal law. Most observers seem to think that the Court forthrightly rejected the journalists' claims in favor of upholding the investigative powers of the grand jury. I believe the decision is more tentative. The Court clearly rejected any journalists' privilege in the particular circumstances of these cases. But there are signs that the Court may be more sympathetic to the privilege if it is asserted in different circumstances.

Let us look more closely at the three cases at hand. One case involved two stories describing the activities of drug users and sellers in and around Louisville; a second, a report on civil disorders in New Bedford, Mass., for which the newsman covered a Black Panther news conference and spent about three hours inside the Panther headquarters to cover a police raid which the Panthers expected but which never occurred; and a third—the best known of the cases—a report on activities of the Black Panthers in Oakland and San Francisco for which Earl Caldwell taped interviews and wrote articles in the *New York Times*.

In all three cases, the reporters declined to provide requested information to a grand jury. Caldwell, however, did not claim that a reporter should be completely free from official investigation with respect to all kinds of confidential information about possible law violations. He and the *Times* made the narrower argument that "so drastic an incursion upon the first amendment freedom" should not be permitated unless the Government could show a "compelling interest" in the reporter's testimony. Such an interest, they submitted, could be demonstrated if the Government convinced a court that the reporter probably has information relevant to a specific violation of law, that the information sought could not be obtained from sources other than the reporter, and that, as a general matter, the subject matter of the investigation is of interest to the Government.

Unlike the reporters in the other two cases before the Court, Caldwell found relief in the lower courts. The U.S. District Court denied a motion to quash the subpoena, but ordered that Caldwell not be required to testify about any confidential sources or information received while gathering news. Caldwell still refused to appear before the grand jury, maintaining that his appearance alone would jeopardize his relationship with the Black Panthers since they would not know what had gone on in the secret session. The District Court held Caldwell in contempt, but the Court of Appeals for the Ninth Circuit sustained an appeal that the first amendment gave him the right to refuse to appear in the absence of the Government's showing of some special necessity.

The opinions of a closely divided Supreme Court pretty well span the spectrum of possible first amendment responses. The majority opinion, authored by Justice White, first argues that requiring reporters to testify before grand juries about confidential sources involves no "intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." Official inquiry is simply an "incidental burdening of the press," resulting from enforcement of civil or criminal statutes of general applicability; citizens generally have an obligation to tell grand juries anything they might know about commission of crimes—the sole exception being the fifth amendment right of any witness to refuse to testify about matters that might be self-incriminating. Thus, these cases present an issue akin to valid general laws—such as general tax statutes or labor relations statutes—being enforced neutrally; in such tax or labor cases, objections to enforcement because of incidental burdens on first amendment activities have properly been given little weight.

The reporters argued for a special privilege because of the consequences of compulsory testimony: the flow of information would be significantly diminished from news sources preferring to remain confidential. However, White argues, not all news sources insist on confidentiality, and reporters may never be called to testify before a grand jury even when they have received information in confidence. Moreover, informants who have insisted on confidentiality often have a substantial interest in dissemination of news which would outweigh any fear of investigation. Thus, the fear of substantial drying up of news sources is speculative. But, White argues, even if some constriction in the flow of news should occur, the public interest in investigating and prosecuting crimes reported to the press outweighs that in the dissemination of news about those activities when the dissemination rests upon confidentiality.

The majority refused to accept Caldwell's claim that the state be required to meet three tests before requiring a reporter's testimony: 1) that there is probable cause to believe that the reporter possesses information relevant to a specific violation of law; 2) that the information sought cannot be obtained by alternative means from sources other than the reporter; and 3) that there is compelling and overriding interest in the information. White meets these arguments with a rather simplified theory of the grand jury's appropriate purposes. They include, first, an investigatory function in determining whether a crime has been committed, and second, a need to review all available evidence to determine whether prosecution is appropriate. Third, he suggests, the Government always has a compelling interest in information about the violation of any of its criminal activities which are important enough to justify investigation into a reporter's confidental information.

White also argues that acceptance of the reporters' privilege would lead to undue confusion in future cases. The potential difficulties include defining the categories of newsmen who qualify for the privilege—a troublesome problem in light of the traditional doctrine that the liberty of the press extends to pamphleteers, lecturers, and almost any author, as well as clear cut journalists. In addition, whether there is probable cause to believe a crime has been committed, or whether the reporter has useful information which the grand jury cannot obtain elsewhere, pose extremely difficult judicial determinations. Finally, courts cannot assess the governmental interest in particular information by weighing the value of enforcing different criminal laws. This would engage the courts in an essentially legislative value judgment of various criminal laws.

The majority opinion clearly rests on the motion that the subject of reporter's privilege is an appropriate one for legislative or executive consideration. It notes that several states already have passed statutes embodying a journalists' privilege of the kind sought, and that the U.S. Attorney General has fashioned a set of limiting rules—guidelines—governing subpoenas which embody some of the standards *Caldwell* advanced.

After seemingly rejecting both the theoretical and the empirical arguments for a journalists' privilege, the majority opinion concludes with an enigmatic suggestion that the door to the privilege may not be completely closed. "Newsgathering,' the majority notes obliquely, "is not without its first amendment protection":

"[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the first amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the first amendment as well as the fifth."

The majority's whisper of encouragement is echoed, if not clarified, in a brief but potentially important concurring opinion of Justice Powell. He emphasizes "the limited nature" of the Court's holding, and states that "we do not hold that . . . state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.'" No "harassment" of newsmen will be tolerated. Powell continues, if a reporter can show that the grand jury investigation is "not being conducted in good faith" or if he is called upon for information "bearing only a remote and tenuous relationship to the subject of the investigation." Moreover, judicial relief could be forthcoming if the reporter "has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement."

What Powell seems to be saying is that the claim of reporters' privilege must be balanced against society's interest in law enforcement in a highly particularistic, case-by-case manner. In a footnote, he reminds us that Caldwell asserted a privilege *not even to appear* before the grand jury unless the Government met his three preconditions. Powell rejects this notion that the state's authority should be thus tested at the threshold. Instead, he seems to suggest that the balance can better be drawn when actual questions are put and the reporter refuses to answer. Presumably, Powell agreed with the decision reached in the other two cases because, although questions were actually put, the reporters in those cases rested their right of refusal on an absolute journalists' privilege rather than on an *ad hoc* demonstration that the particular questions were improper.

Four Justices dissented. Justice Douglas expressed his own categorical view and Justice Stewart wrote a more balanced opinion for himself and Justices Brennan and Marshall.

For Douglas, the proper decision is a simple reflection of his absolute view of the first amendment: "There is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter is implicated in a crime." Douglas thus endorses an absolute privilege: since no answer can constitutionally be compelled, there is no need to require even an appearance. Douglas rejects as insufficient, under the first amendment, Caldwell's and the *Times*' position (which he characterizes as "amazing") that the journalists' privilege should be balanced against competing needs of the Government. Douglas has no doubt about the unfortunate consequences:

> "Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens."

Justice Stewart wrote a careful but impassioned dissent. Stewart's starting point is the broad right to publish guaranteed in our society by the first amendment, from the 1931 landmark decision in *Near vs. Minnesota* to last year's decision on the Pentagon Papers. From this right to publish, Stewart deduces a corollary right to gather news. This right, in turn, requires protection of confidential sources "as a matter of simple logic once three factual predicates are recognized": 1) newsmen require informants in gathering news; 2) confidentiality is essential to creation and maintenance of a newsgathering relationship with informants; and 3) unbridled subpoena power will deter both informants from divulging sensitive information and reporters from publishing.

The journalists' privilege which Stewart would protect is not absolute. The interest of the Government in investigating crime is substantial, and Stewart believes it can properly outweigh the journalists' privilege if the Government can show: 1) that the information sought is "*clearly* relevant to a *precisely* defined subject of governmental injury"; 2) that the reporter probably has the relevant information; and 3) that there is no other available source for the information.

Stewart concludes that the Court's decision will in the long run impede rather than advance efficient law enforcement. Law enforcement officials benefit from dissemination of news about illegal or questionable activities. Thus, for Stewart, the Court's decision is a "sad paradox":

"[T]he newsman will not only cease to be a useful witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for in my view, the interests protected by the first amendment are not antagonistic to the administration of justice."

What conclusion, then, can be drawn about the future of journalists' privilege? Despite what might appear at first to be the Court's flat rejection of the privilege, I believe that both extreme constitutional positions are ruled out. Obviously, the Court has rejected, by an effective 8 to 1 vote, the view advocated by many newsmen and adopted by Justice Douglas that journalists should have an impenetrable shield against official inquiry into confidential sources. Less apparently, a working majority has also rejected the opposite extreme; that journalists can claim no special protection under the first amendment but should be treated like any person with knowledge of illegal activity.

Justice Powell's concurrence reflects at the very least an open mind about extending to newsmen a qualified privilege to refuse testimony that would jeopardize confidential relationships. Powell seems to recognize that a journalist has an important interest in protecting confidential sources. But for Powell the legal context is critical to balancing this interest against society's vital interest in law enforcement. He wants a concrete record of particular questions about a specific confidential relationship before he attempts to reconcile the reporter's First Amendment claim and society's interest in detection and prosecution of crime.

Thus, Powell rejects the invitation in *Caldwell*, we can assume, because he believes that, in constitutional terms, not all grand jury questions are the same, not all journalists are the same, not all confidential relationships are the same, and (perhaps) not all crimes are the same. Relevant differences, in Powell's view, can be gauged only when the issue is at a riper stage than in *Caldwell*, where the reporter had failed even to appear, or than in the other two cases, where the reporters rested their noncompliance on an absolute claim of privilege.

If this reading is correct, Powell, in a future case—perhaps in *Caldwell* if, on remand, it moves to specific questions and refusals to answer based on concrete arguments about particular sources—may shift to joint the four dissenters in upholding a journalist's claim that the first amendment justifies a refusal to disclose confidential information. I suspect that we have not heard the last word from the Supreme Court on journalists' privilege.

Other developments may be expected. The three cases decided all had to do with reporters' testimony before grand juries. Neither the majority nor any of the concurring or dissenting opinions discussed the constitutional status of grand jury subpoenas *duces tecum*—orders compelling the production of tapes, notebooks, outtakes, first drafts, and other forms of tangible evidence. The subpoena initially served on Earl Caldwell was of this sort: it ordered him to produce for the grand jury notes and tape recordings. When he objected, the Government agreed to reduce the scope to an order to testify.

While the opinions do not so indicate, it is conceivable that the Court may find journalists' work product subject to a greater range of constitutional protection than is accorded his testimony. Required production of notes, tapes, or first drafts might seem more directly in conflict with freedom of the press than compelled testimony in that the quality of the actual article, report, or news tape disseminated to the public is more directly affected. If journalists' stock in trade can be as freely compelled as testimony, then journalists will be constrained in the initial writing, filming or taping, when freedom and flexibility are most necessary if the quality of the final product is not to suffer. The Court might therefore find a greater threat to the first amendment in subpoenas requiring production of tangible work product, and strike the balance more on the side of journalists' privilege than it would for testimony.

The final prediction to be drawn from *Caldwell* is that there will be renewed legislative activity. In difficult constitutional problems, the Supreme Court's response often reflects assessment of legislative or executive competence to deal with the problem. The Court's treatment of journalists' privilege is in this tradition. The majority opinion notes that some states have accorded some degree of statutory protection to a journalist's confidential sources and information. Moreover, Justice White points to Atty. Gen. Mitchell's 1970 subpoena guidelines, which almost meet the tests urged upon the Court by Caldwell and *The Times*. The majority makes quite clear its view that defining and protecting journalists' privilege is much better suited to legislative than judicial treatment. White's opinion catalogues the subtle problems of rulemaking and line-drawing (is every pamphleteer and would-be author a "journalist"? what crimes are "serious" enough to warrant investigation into a journalist's confidential sources?) that the majority feels can be more sensibly handled by general legislation than by case-by-case response. Deference to a legislative solution, the majority obviously feels, is realistic in this instance because of the media's political power. The press and the state and federal legislative bodies should respond to the Court's invitation. The best hope for the media is clearly in the nation's legislatures.

Despite the predictable cries of outrage against the Supreme Court's decision, it should be remembered that the Court's rejection of the journalists' privilege may not be as complete as it appears. Courts have traditionally opposed the creation of evidentiary privileges because such barriers clog necessary investigative and adjudicative processes. Therefore, the chances for judicial creation of a sweeping privilege were not good.

On the other hand, there is no doubt that the publicity given the Court's decision will dry up some news sources. Particularly if overzealous prosecutors abuse their power to try to require journalists to divulge confidential information, the consequences for a probing and independent press are troubling to contemplate. The Court has said it is not unconstitutional to compel a reporter to appear before a grand jury to testify about confidential sources. This does not mean that frequent resort to practice is a good idea.

[Copyright © 1973, *Columbia Journalism Review*. All rights reserved.]

[From *Newsday*, Feb. 1, 1973]

A SHIELD FOR YOUR RIGHT

Freedom of the press wasn't written into the Constitution because publishers were popular people—most of them weren't, not even in Revolutionary times—but because a free press was the public's only way to keep watch on government.

So for nearly two centuries of our national history, government took the first amendment guarantee pretty much at face value. There were periods of general feuding and periods of uneasy coexistence, but no one in authority seriously tried to read the first amendment as anything less than a *total* ban on governmental interference with news coverage. An irreverent, unhelpful and occasionally misguided press was seen as just one of the challenges to be faced by men in power.

Then, in the last two years, came a pair of developments sharply divergent from the Constitution's previous application.

First was the Pentagon Papers case, in which the executive branch of government tried to impose prior restraint on a newspaper's publication of the news. The Supreme Court ultimately rejected this instance of censorship-by-injunction, but a precedent had occurred.

Last June it was the Supreme Court that took the second step to narrow long-accepted definitions of freedom of the press, in a case involving newsmen who had been called before grand juries and refused to testify. The newsmen maintained that under the first amendment no grand jury or judge had the right to compel them to reveal confidential sources of files. By the narrowest of decisions (5-4) the court rejected this absolute immunity.

The court did not find anything unconstitutional about newsmen's immunity. It merely ruled that immunity is not automatically and absolutely conferred by the first amendment. Justice Byron White, in his opinion for the majority, actually invited Congress to resolve the issue. As he put it "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable."

Today the Congress is beginning that determination. A judiciary subcommittee of the House is opening hearings into several dozen proposals for so-called "shield" laws protecting newsmen's confidentiality to one degree or another. Similar proceedings will start in the Senate on February 20.

There seems to be strong Congressional sentiment in favor of privilege in principle. But on the details the situation is more complicated. Some legislators (and most newsmen) propose an absolute shield—which is, in effect, what the first amendment had been until last June. Others would place certain limitations, for example requiring a newsman to testify if a judge rules his information is essential and cannot be obtained in any other way.

We have already asked our readers' support in obtaining shield legislation. Now we ask your help—in calls or letters to Congressmen, in discussion in the community—for obtaining *absolute* protection.

With the limited protection bills, it's left to someone in government to determine whether a newsman's sources are shielded or not. This violates the whole purpose of press freedom—which is to make sure no one in government, whatever his station, whatever his motive gains *any* measure of control over the public's channels of information. In other words, it's *your* right to know which is protected by an absolute shield law. It's *your* right to the information a citizen needs which could be threatened by anything less than an absolute shield law.

And neither the government's ability to protect valid secrets, nor the various restraints of law and custom applying to the press, will be altered by this legislation. It merely restores the interpretation given to the first amendment up till last June.

In your own interest, then, we urge that you join us in pressing for Congressional passage of an absolute shield law.

[From the *New Republic*, A Journal of Politics and the Arts, Dec. 16, 1972]

WHO'S HOBBLING THE PRESS?

While the over-sensationalized Manson murder trial was underway in Los Angeles, that city's afternoon newspaper, the *Herald-Examiner*, on October 9, 1970 banner-headlined an "exclusive": "Liz, Sinatra on Slay List—Tate Witness . . . Ghastly Tortures Planned for Stars." What followed down the front page and over two columns inside was a copyrighted story by reporter William T. Farr, drawn from a statement given police by Virginia Graham, who months earlier had shared a prison cell with Susan Atkins, one of the accused Manson "family." During their incarceration, Miss Atkins apparently talked at length and Mrs. Graham subsequently went to police with the information. A transcript of her statement was obtained by Farr shortly before Mrs. Graham was to testify at Susan Atkins' trial. Among the "facts" Farr disclosed in his October 9 story—and which would not, he wrote, be included in her "current testimony"—were details of the Manson family's "weird sex rites" and alleged plans to kill movie stars including Frank Sinatra, who was to be hung upside down on a meat hook, skinned and turned into pocketbooks to be sold at hippie stores.

In the rush to defend a newsman's untrammeled right to print what he wants and be under no constraint to reveal his sources, the journalistic community is making a hero of William Farr. His jailing for refusing to name the lawyers who gave him the Graham transcript is presented as part of a wider, dangerous pattern of intimidation, and a sign that federal legislation is needed to protect newsmen's unrestricted right not to tell courts, prosecutors and legislative committees where they get their information.

There is, we recognize, a threat to press freedom. It surfaced when the Nixon administration moved through subpoena against reporter Earl Caldwell in the Black Panther case, and when it later sought prior restraint against newspapers in the Pentagon papers case. The Supreme Court backed up the argument that reporters have no automatic claim of immunity and could be compelled to testify before grand juries; it almost backed prior restraint. Since then, the administration's skirmishes against newsmen seem to have been halted, temporarily, but the assault has been carried forward by state and local prosecutors, many of whom have their own grudges against the press—some rational, some not. It is against this emotional background that the *Farr* case and that of Peter Bridge, whose article in the *Newark News* led to his jailing should be examined—not just for the legal equities, but for the reporting they represent. Should the push for federal legislation protecting journalists reach the floor of Congress, the stories themselves will be a focal point in the debate. Unfortunately, both Farr and Bridge may influence some legislators to turn from shielding the press to hobbling it.

Take the *Farr* case. The *Manson* trial judge, Superior Court Judge Charles H. Older, in the wake of blaring headlines which accompanied President Nixon's incredible opinion as to Manson's guilt, had invoked a "fair trial" or "gag" rule. Under that rule, defense and prosecution lawyers, defendants, witnesses, police and other attachés of the court were barred—under threat of contempt—from passing information to the press. Nevertheless, persons covered by that rule, including two of six lawyers in the case—gave Farr the transcript of Mrs. Graham's police statement. On October 8, a day before its publication by the

Herald-Examiner, Mrs. Graham's lawyer told Judge Older the document was in Farr's hands. The judge called an informal hearing in his chambers and, when Farr confirmed he had the transcript, Older remarked that it would be helpful for a fair trial if it were not printed; he added it would be a serious matter if the material got to the jury. The judge also asked Farr to reveal his source, at the same time noting the reporter was covered by the existing California "shield" law. Farr refused, and later that night, after publication was set, called Judge Older to warn him, so that precautions could be taken to prevent the jury from seeing the headlines as the jurors rode the bus from their sequestered hotel rooms to the courthouse.

On the day of publication, defense lawyers moved for a mistrial on the grounds the trial had been prejudiced by Farr's *Herald-Examiner* "exclusive"—a motion denied by Judge Older.

Seven months later, when Farr was no longer employed by a newspaper and theoretically no longer covered by a shield law, Judge Older held a formal hearing on the matter. Farr's lawyer stipulated that two *Manson* case lawyers plus one other person subject to the judge's "gag" rule had been Farr's sources—but he declined to name them. The judge took the position that Farr had no immunity and was hiding the identity of persons who had acted in contempt of court, a position that was upheld when the case was taken to appeal.

In retrospect it is worth asking whether defense lawyers set in motion events they thought could be exploited to bring about an end to the trial. Were Farr and his paper being used? Only Farr and his editors can answer that. What we know is that Farr's story was not "investigative reporting which in many instances has uncovered wrong-doing by public officials and private citizens, or provided other information the public was entitled to have"—descriptive language found in a resolution adopted last month by the Associated Press Managing Editors Association, commending Farr and expressing "concern about judicial censorship and such injustices as Farr's being jailed . . ." It seems to us that the newspaper erred by rushing into print with a seamy sensational account based on material obtained in contradiction to court order, and where the selling of more newspapers was the only public service rendered.

The *Bridge* case offers a different sort of problem. Newark's black mayor, Kenneth Gibson, has been fighting the powerful white Italian minority of his city helped by State Assemblyman Anthony Imperiale. This past spring, the focus of their dispute was the Newark Housing Authority, a six-member commission on which Gibson had only one representative, Pearl Beatty. When the executive director of the agency retired, Imperiale, who controlled the votes, pushed to have a successor named immediately. Gibson sought to delay until two more of his appointees, then awaiting city council approval, could be placed on the authority. The vote on a new director was set for May 2. The weekend before the vote, Gibson wrote and released a letter to HUD Secretary George Romney asking his help in postponing the housing vote and alleging "organized criminal elements" were forcing selection of the new director. On the day of decision, the *Newark News* published a front-page story by Peter Bridge under the headline: "City Housing Aide Repeats Bribe Offer." Bridge quoted Mrs. Beatty as saying that "a man walked into my office and offered me $10,000 if I would vote for 'their' choice for executive director." The story added, "she did not know the man and probably would not recognize him if she saw him again.

The Beatty allegation as printed lacked any hard facts, such as when the offer had taken place or, surprisingly, any description of the person who had allegedly made the offer. Yet Bridge wrote it, and the *News* splashed it on its front page the day the controversial vote was scheduled to take place. Bridge never wrote a follow-up (it wasn't his regular beat), and says that his responsibility as a reporter consistedly solely in reporting accurately what was said, and not whether the statement was accurate. "How are you going to prove or disprove it?" he said recently; his job was to get a public official's statement into print and do it when the story was hottest .

Newark had been plagued—and still is—by conflicting charges and countercharges between Gibson and Imperiale forces, all carried by the press. The county prosecutor, pressured by those allegations, set up a special grand jury last May to sort out what was true and false. Mrs. Beatty, when called, gave an altogether different version under oath of the "bribe affair" than that reported by Bridge. She also refuted two other versions attributed to her by others. She said news stories had distorted the interview. To wind up his inquiry, the prosecutor's office decided to subpoena Bridge.

We doubt the propriety of the prosecutor's move, just as we doubt the propriety of the *News'* printing of Bridge's story. And, had not the Nixon administration set the pattern, we doubt Bridge would ever have been called. But we sympathize with a law enforcement official who reads allegations in his daily newspaper that seem to him unfounded, yet are printed as if they were true.

The rest of the Bridge story is well known. Though the original aim was to have him confirm the accuracy of the Beatty interview, Bridge's decision to try to quash the subpoena prompted the prosecutor's office to enlarge on the information sought. The state courts ruled Bridge had given up his immunity when he identified Mrs. Beatty as his source. When Bridge appeared before a grand jury, the questions went to other information than that which appeared in his story. Bridge refused to answer outside the facts printed and spent 21 days in jail. He insisted he would lose his sources if he disclosed what else was said, and that the questions went beyond the Beatty incident. The prosecutors were appalled that Bridge quoted Mrs. Beatty on a matter as important as a bribe, but never took a note during the interview and never confirmed the quote before publication.

The irony is that both cases have been used to wave the banner for investigative reporting—which neither represents. We would argue that the main bar to tough, critical reporting is not the "chilling effect" of the Supreme Court's *Caldwell* decision nor the absence of a sturdy federal law shielding reporters. The principal deterrent to such reporting lies within the profession itself. Hard information is hard to come by. It takes time to dig out, and few publications want to invest the time or money. It takes perseverance, and few reporters and editors these days have much of that. It isolates you from sources for whom truth is a lesser good, and few journalists relish isolation. And when things really get rough, it may mean that your income taxes are reviewed (as CBS' John Hart's were when he came back from a reporting trip to North Vietnam), or your competitors get the scoops (as happened to *The Washington Post* with *The Washington Star-News'* exclusive interview of the President).

Thus, though we are not indifferent to the danger to press independence from prosecutors and judges, we are equally concerned by the search for a shield law or a press council—in fact by anything that promises an institutionalized or legalized shortcut to fair and full reporting but could turn out to be just the opposite. There are no shortcuts. The press can only put its trust in the First amendment pure and clear, and plug away at getting the whole truth and nothing but the truth.

[Reprinted by Permission of *The New Republic*, © 1973, Harrison-Blaine of New Jersey, Inc.]

SPEECHES

SUPREME COURT UNDERMINES FREEDOM OF THE PRESS

Mr. ERVIN. Mr. President, on June 29, 1972, the Supreme Court announced its decision in three consolidated cases which involved an interpretation of the first amendment respecting newsmen's confidential sources of information. In *Branzburg* v. *Hayes*, a majority of five Justices determined that there is no first amendment privilege for newsmen to refuse to answer questions of a Grand Jury even if those questions require the disclosure of confidential sources and information.

Justice White's opinion for the majority rejects the analysis of the Ninth Circuit Court of Appeals in the case of *U.S.* v. *Caldwell*, one of the consolidated cases, which had recognized a first amendment newsmen's privilege against compulsory disclosure of confidential sources and information in certain circumstances. Justice White wrote:

"Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

On previous occasions I have stated that the Ninth Circuit Court's decision and the analysis upon which it was based constituted a wise and true reading of the First Amendment's guarantee of freedom of the press. I am deeply concerned and greatly disappointed over the majority opinion in *Branzburg* v. *Hayes*, which reversed the Ninth Circuit's decision in the *Caldwell* case. I must agree with Justice Stewart, writing in dissent, that, "The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society."

In protecting *New York Times* reporter Earl Caldwell from appearing before a Federal Grand Jury in California investigating the Black Panthers, the Ninth Circuit Court emphasized the vital role which a free press plays in a free society. It correctly observed that the first amendment was adopted to preserve an "untrammeled press as a vital source of public information." Judge Merrill wrote for the Court of Appeals,

"The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the first amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy."

He warned about the threat to freedom of the press which comes from fear of government interference with the newsman's investigative process. He cautioned,

"To convert news gatherers into Department of Justice investigators is to invade the autonomy of the press by imposing a governmental function upon them. To do so where the result is to diminish their future capacity as news gatherers is destructive of their public function."

It is important to understand that neither the District Court nor the Court of Appeals in the *Caldwell* case purported to establish a sweeping, unlimited privilege for newsmen. The general rule set forth by the Court of Appeals requires a balancing of the interests of the first amendment and the interests of law enforcement. It would simply require that where the public's first amendment "right to be informed" would be jeopardized by a journalist's submitting to secret Grand Jury interrogation, the government must demonstrate a compelling need for the witness' presence before he can be subpoenaed. The Ninth Circuit opinion emphasized that its rule was a narrow one. It specifically noted, "not every news source is as sensitive as the Black Panther Party has been shown to be respecting the performance of the 'establishment' press or the extent to which that performance is open to view."

Quite clearly, the Court of Appeals decision resulted from a careful consideration of both the first amendment and law enforcement interests at stake. The decision struck a wise balance beween these interests under the circumstances of this particular case.

I am compelled to say that the Supreme Court's reasons for rejecting the Ninth Circuit's decision are neither impressive nor persuasive. The majority opinion does not take into account the practical effect of its holding on newsmen and the public's right to be informed. At one point the majority opinion naively describes the consequences of its decision as not "forbidding" or "restricting" the use of confidential sources by the press. It states, "reporters remain free to seek news from any source by means within the law."

Of course, it would be absolutely unprecedented and unconstitutional for the government to "forbid" or "restrict" newsmen from using confidential sources in their effort to enlighten Americans on matters of public concern. That is not the problem raised by the subpoenas to Earl Caldwell and other reporters. The problem for them and for the public is how a reporter can continue to gather news and to report to the public from and about sensitive persons and issues when that reporter can be compelled by the government to disclose these confidential sources and information in secret Grand Jury interrogations.

Aggressive and curious newspaper reporters have always been a tempting and easy source of information for government. Nevertheless, whatever short-term benefits may flow from government's reliance upon newsmen as a substitute for its own investigations, the long-term threat to the public's right to be informed about the controversial as well as the routine is too great a risk to take in a free society.

Justice Setwart's dissenting opinion in *Branzburg* v. *Hayes*, declares;

"A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated."

The right to gather news, Justice Stewart correctly observes, "implies a right to a confidential relationship between a reporter and his source."

Several affidavits filed with the Ninth Circuit Court by some of the country's outstanding newsmen underline the practical importance of protecting newsmen's confidential sources. They uniformly warn that without some protection from zealous law enforcement, sensitive sources for news about controversial subjects will quickly "dry up."

In one of these affidavits, Mr. Walter Cronkite of CBS News stated,

"In doing my work, I depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events. Without such materials, I would be able to do little more than broadcast press releases and public statements.

"The material that I obtain in privacy and on a confidential basis is given to me on that basis because my news sources have learned to trust me and can confide in me without fear of exposure. In nearly every case their position, perhaps their very job or career, would be in jeopardy if this were not the case. There are almost daily examples of this. For example: A member of the staff of a United States Senator advised me, far in advance of the announcement, that his employer did not plan to run for reelection. Another person in a similar position tipped me to his employer's intention to seek a higher office. An officer high in Pentagon circles recently offered evidence of pressure high in the military command structure to get the President to cut back on his Viet Nam withdrawal commitments. A bartender told me of fraud in restaurant inspection in New York City. A scientist asserted that the Atomic Energy Commission's safety standards for atomic energy installations were not adequate. None of these persons would have volunteered this information if they thought they would be exposed as the source of the information. In short, I would be unable to obtain much of the material that is indispensable to my work if it were believed that people could not talk to me confidentially. I certainly could not work effectively if I had to say to each person with whom I talk that any information he gave me might be used against him."

Mike Wallace, an outstanding investigative reporter, declared in a similar affidavit;

"In my experience in investigative news gathering the ability to establish and maintain the confidence of people who may be willing to suggest leads and divulge facts and background information to me has been essential. If such people believed that I might, voluntarily or involuntarily, betray their trust by disclosing my sources or their private communications to me, my usefulness as a reporter would be communications to me, my usefulness as a reporter would be seriously diminshed."

An examination of the Supreme Court's decision in *Branzburg* v. *Hayes*, must be made in the context of the importance of a free press to any free society. The rationale for protecting newsmen from government inquiry is not to protect them individually, but to insure that the public has access to that free flow of information so vital to a democracy. The first amendment, including its guarantee of a free press, was designed to make Americans politically, intellectually, and spiritually free. Its prohibition against government suppression and intimidation of the press is couched in sweeping language. In my judgment, the Founding Fathers intended the first amendment's protection of the press to be liberally construed.

In this decision, the Supreme Court's majority has overlooked the philosophy of the first amendment's guarantee of a free press. The fivt-justice majority has casually dismissed the practical effects of its holding which will certainly undermine the ability of reporters to search out the truth for the American people. The majority has apparently forgotten the historic dangers always implicit when government, even for the most noble of purposes, interferes with and restricts the operations of the press. And, I am sadly compelled to believe, it has not fully understood the grand and hopeful assumptions which underlay our Founding Fathers' conviction that men have nothing to fear from freedom of thought, speech, and press as long as truth is free to combat error.

I believe that Justice Stewart in his dissent has accurately perceived the relationship of the news gatherer and the confidentiality of his sources to the purposes of the first amendment. He wrote,

"The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press, because the guarantee is 'not for the benefit of the press so much as for the benefit of us all.' "

Concern over government interference with the journalist's function was manifested during recent hearings of the Senate Subcommittee on Constitutional Rights on the state of freedom of the press in America. Representatives of news organizations and publisher associations and individual newsmen expressed their alarm over government's sudden increased subpoenaing of newsmen over the last few years. A Twentieth Century Fund Task Force on Government and the Press studied in detail this problem and has published its findings in an impressive report entitled "Press Freedoms Under Pressure." A number of professional news associations have advocated enactment of legislation to protect newsmen's confidential sources.

Responding to this growing concern over government interference with the operation of a free press, Senator James Pearson has introduced S. 1311, widely known as the "newsmen's privilege" bill. Referred to the Constitutional Rights Subcommittee, this bill has received considerable support and was the subject of discussion during the Subcommittee's hearings. More recently, following the Supreme Court's reversal of the *Caldwell* decision, Senator Cranston introduced another version of a "newsmen's privilege" bill, S. 3786. Similar legislation has been introduced in the House of Representatives. This legislation is designed to do what the Supreme Court refused to do—to protect newsmen's confidential sources and information in certain circumstances from compulsory disclosure to governmental bodies.

In the course of our hearings of freedom of press, I expressed my hope that the Supreme Court would affirm the wise holding of the Ninth Circuit Court of Appeals in the *Caldwell* case. It was my view that, once having established a constitutional basis for a newsmen's privilege, the courts could best balance the competing interests between the press and government on a case-by-case basis without the need for any legislation. Inasmuch as the Supreme Court has rejected a constitutionally-based privilege for newsmen, proposed legislation establishing a privilege for newsmen deserves renewed consideration.

Mr. President, there has been considerable editorial commentary on the Supreme Court's decision in this case. Because I consider the issues involved to be of fundamental importance to the freedom of our country, I ask unanimous consent that several of these editorials be inserted at this point in the Record.

IS THE PRESS BEING HOBBLED?

(By Sam J. Ervin, Jr., U.S. Senator, Remarks made before the North Carolina Press Association, January 19, 1973)

It is my belief that the first amendment was adopted by our Founding Fathers for two basic reasons. One reason was to insure that American would be politically, intellectually, and spiritually free. The other was to make certain that our system of government, a system designed to be responsive to the will of an informed public, would function effectively.

The scope of first amendment freedoms, including freedom of press, is broad and was intended to be so. The first amendment is impartial and inclusive. It bestows its freedoms on all persons within our land, regardless of whether they are wise or foolish, learned or ignorant, profound or shallow, and regardless of whether they love or hate our country and its institutions.

For this reason, of course, first amendment freedoms are often grossly abused. Society is sorely tempted at times to demand or countenance their curtailment by government to prevent abuse. Our country must steadfastly spurn this temptation if it is to remain the land of the free. This is so because the only was to prevent the abuse of freedom is to abolish freedom.

The quest for the truth that makes men free is not easy. As John Charles McNeil, a North Carolina poet, said, "teasing truth a thousand faces claims as in a broken mirror." The Founding Fathers believed—and I think rightly—that the best test of truth is its ability to get itself accepted when conflicting ideas compete for the minds of men.

And, so, the Founding Fathers staked the very existence of America as a free society upon their faith that it has nothing to fear from the exercise of first amendment freedoms, no matter how much they may be abused, as long as truth is free to combat error.

Representatives of the press have been recently claiming that they are not free, that in effect the Nixon administration has shackled them with threats and restrictions that do not permit them to fulfill the role which the Constitution gives them. There is substance, I feel, to their claims. *Newsweek* magazine goes so far as to say that the recent clashes between the administration and the media are "without precedent in the history of the United States."

To some, this may be overstating the significance of the conflict. The press has typically played a critical role of government, and government has often responded with intermediate condemnation or simply with charges of irresponsibility. I cannot say that such responses have always been unjustified.

But the actions of the present administration appear to go beyond simple reactions to incidents of irresponsible or biased reporting, to efforts at wholesale intimidation of the press and broadcast media.

I point to a few examples.

Recently we saw Clay Whitehead, director of the White House office of Telecommunications Policy, explaining a new administration proposal which would condition the renewal of broadcast licenses by the FCC on whether the local station management is "substantially attuned to the needs and interests of the communities he serves." He later made clear that what was really sought was control of network news: "Station managers and network officials," he said, "who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."

In a rather interesting sidelight which indicates how this plan might work, it was recently reported that the finance chairman of Mr. Nixon's campaign in Florida, George Champion, Jr., has challenged the license of WJXT in Jacksonville. WJXT was the station whose reporters discovered some controversial statements of Nixon Supreme Court nominee G Harrold Carswell, which contributed to his failure to receive Senate confirmation. To make matters worse, the station is owned by the *Washington Post*, which is a frequent administration critic.

We also see significant inroads being made into public broadcasting. Under administration pressure, funds for the Public Broadcasting Corporation, which in turn provides funds for the Public Broadcasting Service, were slashed in the last Congress. As a result the corporation board, a majority of which are administration appointees, has decided to withhold funds, but only for certain public affairs programming which had often included comment critical to the Executive. Programs such as William Buckley's "Firing Line," "The Advocates," "Bill Moyer's Journal," "Wall Street Week," and "Washington Week in Review" will not be seen after this season unless the corporation agrees to release the funds.

It was the intent of the Congress in enacting the Public Broadcasting Act of 1967 which created an intermediary corporation to receive funds for public television, to insulate control of programming from those who appropriated the dollars for it. It now appears that the intermediate agency is asserting the sort of political control which the Congress wisely denied itself.

There are other examples of administration intimidation which come to mind: the early speeches of the Vice President harshly criticizing the press; the investigation of CBS newsman Daniel Schorr who had been critical of the administration in 1971; the recent exclusion of the *Washington Post*, particularly critical of the President's war policies, from coverage of White House social events; and, of course, the controversial Pentagon Papers case, which, whatever one may think of the circumstances, was the first time that the government sought to enjoin the publication of a news story.

How many editorials have not been written, or critical comments not made, because of these incidents is not something which can easily be proved—I do recall the "instant analyses" which followed presidential addresses. Following considerable administration objection, we no longer have them. Decisions not to criticize are decisions which people keep to themselves. But the fact that intimidation cannot often be readily shown does not mean it is not present.

So we come to what was the announced subject of my presentation: the newsmen's privilege proposals. I wanted to give you this background because I believe that the threat of a subpena to testify before a governmental tribunal is yet another means of governmental intimidation of the press. A newsman who publishes a story obtained from confidential sources which is critical or accusatory of public officials or programs now faces the threat of subpena and a possible jail sentence if he refuses to reveal his source. If he decides to back off a controversial story, it is the public which has lost information which could lead to political and social improvement.

The administration's stance with regard to a statutory testimonial privilege has been one of rather passive resistance. Assistant Attorney General Roger Cramton, testifying before a House Committee last fall, said that while the administration favored a qualified privilege in principle, it felt that such a privilege was unnecessary. He furthermore endorsed the Supreme Court's ruling in last June's *Caldwell* decision that the first amendment's guarantee of a free press does not entitle newsmen to refuse to reveal confidential sources of information.

I myself criticized the *Caldwell* opinion as failing to take into account the practical effect of such a ruling upon reporters and their sources of information. If sources of information cannot be assured of anonymity, chances are they will not come forward. If the reporter is willing to assure confidentiality, he must accept the fact that he may have to serve a jail sentence in order to fulfill his promise. It is rather ironic, I think, that the reporters themselves are the ones who ultimately are jailed for refusal to reveal sources of stories which the public would never have been aware of, had not the reporter himself decided to publish.

An example recently came to my attention which I feel illustrates the necessity of some type of privilege. It involves a reporter for the *Memphis Commercial Appeal* in Memphis, Tennessee—Joseph Weiler. An informant had contacted the paper with the information that children confined to the state-owned hospital for the mentally-retarded in Memphis were being beaten and otherwise mistreated by supervisory personnel. After some investigating, Mr. Weiler wrote a story which corroborated these reports. An investigation by a committee of the state senate ensued, but curiously enough, the focus was upon who the state employee was who had tipped off the newspaper rather than the charges themselves. Mr. Weiler was subpenaed and requested to bring whatever notes and correspondence he had concerning the case. He appeared before the committee but refused to identify his source. He was unanimously cited for contempt of the committee.

I submit to you that the losers here are not Mr. Weiler and his newspaper, but rather the people of Tennessee whose tax dollars support that institution, and the children of that hospital who are helpless to improve their lot.

It is this sort of case—where confidential information leads to the discovery of flaws and shortcomings in our social and political processes—which makes the passage of some type of statutory privilege particularly compelling. Without the protection of anonymity, inside sources may simply "dry up." The stories will not be written. We all will be the losers. And nobody—culprit or reporter—will go to jail.

I am aware of the criticism that has been levelled at these proposals. A testimonial privilege will act as a shield behind which biased, or otherwise irresponsible, reporters will hide. Newsmen will be able to criticize unjustly and not be held accountable for it. I would answer by first having you note that most of the proposals creating a newsmen's privilege now provide that a newsman may not claim the privilege in a suit for defamation, which includes libel and slander. This means that the protection which we now have against irresponsible reporting, namely, a civil suit for defamation, would retain its vitality as a check.

Undoubtedly there are legitimate interests to be served by having newsmen testify as other citizens. Certainly it is desirable to have all the evidence possible before a court when a man's freedom or livelihood is at stake, or when society attempts to identify and punish an offender. The newsmen's privilege, as any testimonial privilege, must necessarily impede this search for truth to a degree. The question is whether, considering the effects on the flow of information to the public, it is worth it; and if so, can it still be drafted to accommodate the competing interests.

There are now three newsmen's privilege bills and one resolution pending in the Senate, and a multitude of bills introduced in the House. The Subcommittee on Constitutional Rights will hold hearings on the subject beginning February 20th.

The bills all concern themselves with four basic questions: First, should the privilege be a qualified or an absolute one. Those which provide a qualified privilege attempt to set standards which must be met by the person seeking the newsman's testimony in order for the privilege to be divested. The qualifications in all of the proposals, although differing in specifics, are intended to reconcile the competing interests involved. Those favoring an absolute privilege argue that it is impossible to accommodate the competing interests without critically limiting the newsmen's protection.

The second question is whether the privilege should apply to only federal tribunals or whether it should also apply to the states. While it is true that many of the recent cases involving a newsmen's privilege have come before state tribunals, one also must realize that to make the privilege applicable to the states, the Congress will be legislating a rule of evidence for use in state courts, and this would be an intrusion into an area of state responsibility which the Congress has not engaged in previously .It raises serious problems of federalism. No one, certainly not Congress, can assert an exclusive claim on wisdom. Here, as in so many cases, it is highly important to let all states make their own judgment on the balance of interests involved.

A third area addressed by these proposals is the matter of who is a newsman. Who should be entitled to claim the privilege? The first amendment applies to all citizens, and protects their right to publish information for the public. But the testimonial privilege can of course not be available for all. Thus, a serious problem of definition is posed. It must be broad enough to offer protection to those responsible for news reporting, and yet not so broad to shield the occasional writer from his responsibility as a citizen. Any attempt at defining the scope of the privilege is in effect a limitation on the first amendment. It will confer first amendment protection on some who deserve it and deny it to others with powerful claims to its mantle. Do we include scholars as well as reporters? The weekly and monthly press as well as the daily? Free lance or just the regularly employed? TV cameramen? Underground papers? The radical press?

So difficult is this question that I would much have preferred the Supreme Court to adopt the wise and balanced approach of the 9th circuit in *Caldwell*. Some of these issues, if not the whole question of the newsmen's privilege, would be better left to a case-by-case development in the courts. Unfortunately that avenue is now closed for all practical purposes, and Congress must attempt to be as wise as the drafters of the first amendment 200 years ago.

Finally, there is the question of the procedural mechanism through which the privilege is claimed. As is often the case, the effectiveness of the substantive provisions may well depend on the method by which they are employed. In the case of the newsman, should the party who is seeking his testimony be required to show in advance of the issuance of a subpena that the newsman is not entitled to protection under the statute? Should the newsman be required to answer a subpena before he can claim the protection of the statute? And, if so, should he have the burden of showing that he is entitled to protection or should the party seeking the testimony have the burden of proving he is not entitled? The means by which the privilege is claimed or divested may, for all practical purposes, determine its effectiveness.

These then are the basic questions facing the Congress with respect to this legislation. The Subcommittee on Constitutional Rights, as I have mentioned, will receive testimony on the proposals during the last two weeks in February, and I am hopeful that the Subcommittee will be able to favorably report some sort of bill shortly thereafter.

A free press is vital to the democratic process. A press which is not free to gather news without threat of ultimate incarceration cannot play its role meaningfully. The people as a whole must suffer. For to make thoughtful and efficacious decisions—whether it be at the local school board meeting or in the voting booth—the people need information. If the sources of that information are limited to official spokesmen within government bodies, the people have no means of evaluating the worth of their promises and assurances. The search for truth among competing ideas, which the first amendment contemplates, would become a matter of reading official news releases. It is the responsibility of the press to insure that competing views are presented, and it is our responsibility as citizens to object to actions of the government which prevent the press from fulfilling this constitutional role.

THE PRESIDENT AND THE PRESS

(By Sam J. Ervin, Jr., U.S. Senator, Remarks made at Texas Tech University, February 16, 1972)

I am indeed honored to be here this evening and to be the first recipient of your Thomas Jefferson Award. It is highly appropriate that an award of this type bear Jefferson's name. He, above all, appreciated the vital role which the press plays in a free society. His appreciation was often expressed in eloquent and unforgettable terms. In 1787, he wrote:

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

The Founding Fathers, of course, decided that we should have both government and newspapers. But they recognized the truth of what Jefferson was saying. Our system of government is premised upon the will of the people. And in order for people to make up their minds—whether it be in a voting booth or at the local PTA meeting—they need information. They have a right to get at the truth, for themselves. Government, Jefferson was reminding us, does not hold the corner on truth.

The press has the responsibility to present ideas, and to report events both within and without the government. While the Founding Fathers did not seek to institutionalize the press, or to provide it with special powers, they nevertheless recognized that a free press was essential. It is, as Walter Lippmann has observed, "not merely a privilege, but an organic necessity in a great society."

The First Amendment states that "the Congress shall make no law . . . abridging the freedom of the press." It is a clear and unequivocal prohibition, forbidding any governmental encroachment upon the right of the people to ascertain the truth for themselves in what they read or hear, and to govern themselves accordingly.

The press does not belong to the publishers or editors or the anchor men on the evening news. It belongs to the people. Regardless of how close one is to the workings of government, we are all dependent upon the press for information. Where the press is hobbled, we all walk a more uncertain path.

Rarely does government flagrantly violate the First Amendment. No newspapers are confiscated. No books are burned. Congress has passed no law forbidding criticism of its members.

What we do have is subtle erosion—a weathering away. The pillar of press freedom is not being attacked with the picks and shovels of official censorship, but by the wind and rain of threats and intimidation. The process is often almost imperceptible.

The Nixon Administration has lately been charged with responsibility for a deliberate effort at erosion of press freedom. Newsweek magazine described the recent clashes between the media and the administration as "without precedent in the history of the United States." Bill Monroe of the *Today* Show stated that in his opinion the administration is trying to "maximize governmental pressure and minimize media independence."

These are serious charges—particularly serious in view of the fact that we have had clashes between government and the press since the beginning of the republic. The press has a natural adversary role to whatever administration is in power. Still, Bill Small, CBS News Bureau Chief in Washington, contends "there's never been a frontal assault on the press as we have now."

I would like to look into this situation with you for the next few minutes.

I thought it was particularly interesting that one of the first things which Mr. Nixon did when he moved into the White House in 1969 was to order the removal of two wire service teletype machines and a three-screen television console from the oval office. These had been placed there by his predecessor, the late President Johnson, who liked to keep abreast of what the media was saying about him.

Mr. Nixon does not seem to have the same penchant. His relationship with the press has not been a particularly happy one. We remember, without my recounting them, some of his earlier outbursts of bitterness and resentment towards reporters. He now has established himself as a president aloof and disdainful of the media. His press conferences are rare. His interviews are rare and often orchestrated in advance.

His view of the press, whether consciously directed or not, seems to have filtered down to his subordinates whose speeches and comments have shown an extraordinary disdain for the role of the press.

We all remember the early statements of the Vice President lambasting the so-called "liberal eastern press" and the network news commentators.

But over the past year we have also seen White House adviser Charles Colson predict in a television interview that the television networks "are going to be broken up one way or another in the next four or five years" because of "new technology in communications."

We have seen Herb Klein, White House Communications Chief, telephone NBC to complain that one of its reporters, Catherine Mackin, had been "unfair" to the President in interpreting remarks about Senator McGovern.

We have seen Ken Clawson, White House Deputy Director of Communications, charge the *New York Times* with "being a conduit of enemy propaganda to the American people" for some of its Vietnam war coverage.

We have seen presidential assistant Patrick Buchanan warn that if biased reporting continued "you're going to find something done in the areas of antitrust type action."

We have seen Acting FBI Director L. Patrick Gray criticize newspaper and television reporting as "often inaccurate, biased and grossly unfair."

These officials, of course, have the right to make these statements. And perhaps they are not unjustified. If these comments were the extent of the administration's reaction to what it felt was unfavorable or unfair press treatment, they should be applauded as a healthy exchange between natural adversaries. But the reaction of the Nixon Administration has gone beyond mere charges of irresponsibility.

In 1971 we saw the White House direct the FBI to investigate CBS newsman Daniel Schorr, an administration critic, supposedly on the grounds that he was being considered for a position of employment which was never specified. It was a transparent attempt at intimidation, not necessarily at Schorr, but by implication at all the critical reporters.

We have recently seen the *Washington Post*, also a frequent administration critic on the war, excluded from covering the White House social events.

We have the controversial Pentagon Papers case, which, whatever one may think of the circumstances, was the first time that the government had sought to suppress the publication of a news story.

Another example of the administration's attempt to intimidate the media can be seen in a new proposal to govern the renewal of broadcast licenses. Last December Dr. Clay Whitehead, Director of the White House Office of Telecommunications Policy, announced an administration proposal to condition the renewal of broadcast licenses of television stations on whether in the judgment of the FCC the local station management is "substantially attuned to the needs and interests of the communities he serves." Dr. Whitehead later made clear that what was really sought was control of network news: "Station managers and network officials," he said, "who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."

Since it would be impossible for local station managers to push a button to shut off disagreeable portions of the network news programs, this proposal would encourage local managers to pressure the network news officials to drop comment critical to the administration. The ultimate arbiter of whether the local management had met these responsibilities would be the FCC. In effect, Dr. Whitehead's proposal would make the FCC the censor of so-called "bias and distortion."

I would suggest to you that even if this administration proposal fails to win congressional approval, the networks have gotten the message. If not, it was underlined by an apparently unconnected event which occured about the same time. In December, the finance chairman of Mr. Nixon's campaign in Florida challenged the license of WJXT in Jacksonville. WJXT was the station whose reporters discovered some controversial statements of Nixon Supreme Court nominee G. Harold Carswell. The statements contributed to his failure to receive Senate confirmation. To make matters worse, the station is owned by the *Washington Post* and it will cost them about one-half of a million dollars to defend against the challenge. The owners of other stations must also wonder what will happen should they arouse the displeasure of the current administration.

Most stations can ill afford to spend that kind of money to beat off challenges to their licenses. It is a high price for irritating the President.

Another example of the administration's asserting itself over the media involves public broadcasting. In the last Congress, the President vetoed the appropriation for the Public Broadcasting Corporation which in turn funds the Public Broadcasting Service. The appropriation which later came out of the 92nd Congress represented a substantial reduction in funding. The administration also made a point of arguing for more local control over public broadcasting. One effect of that would be less network productions and less network public affairs programing critical of administration policies.

Recently, the Board of Directors for the Public Broadcasting Corporation, now controlled by administration appointees, announced that in view of the funds reduction it was withholding the funds for public affairs programing, and only public affairs programing. The Chairman of the Board explained that public affairs programing is not a "desirable activity" for public broadcasting to be engaged in. And so, programs such as William Buckley's "Firing Line," "Bill Moyer's Journal," "Wall Street Week in Review," and "Washington Week in Review"—all of which had at one time or another been critical of the Nixon Administration and all of which had always been independent of the Nixon Administration—were not to be funded for the coming season.

Nine days ago, the Corporation Board announced that it had decided to fund some of these programs after all. I would again suggest to you that while this appears to be a concession to public affairs programing on the Board's part, the damage has been done. The producers of these programs which are allowed to return have gotten the message.

Incidentally, now that the central Board is more sympathetic to the administration's views, we hear no more of decentralized control.

I would like to mention what has become one of the more obvious battlegrounds between government and the press—the matter of the so-called newsmen's privilege not to reveal the sources of confidential information to governmental tribunals. Last June the Supreme Court held in its controversial *Caldwell* decision that the First Amendment guarantee of a free press did not entitle a newsman to refuse to reveal the name of his informant before a grand jury. Since that decision, we have witnessed the spectacle of several newsmen going to jail for refusing to name their sources.

Reporters are now on the horns of a dilemma. If they refuse to reveal a source, they are held in contempt and thrown in jail. If they agree to reveal it, they lose their integrity as investigative reporters, their sources, and their stories. It is a dilemma that may frequently be resolved by the reporter's deciding it isn't worth the risk to write the story. In this case, the public is the loser.

The issue is not simply whether the reporters can be counted on to shield their sources, but whether the press can continue to function in its role as a conveyor of meaningful information to the public. Informants who were once satisfied with the reporter's pledge not to reveal their identity, are now going to hesitate to accept his word knowing that an indeterminate jail sentence may be in store for him. The cost to the public of this reluctance on the part of sources cannot be determined. As A. M. Rosenthal has written, "We will never know what we might have known."

It is entirely clear, however, that every aspect of public affairs will be a little less open to public access. Rosenthal wrote:

"There will simply be fewer and fewer people in government and out of government willing to take the risk that the press will be willing to protect them. It will not all happen tomorrow but it will happen as long as this country is ready to say that the price of dissidence is exposure."

A free press depends upon access to information and the ability to protect confidential sources. These are its tools. Take them away and the press is free only to publish official news releases. And we the public never learn anything except what those in power want us to hear.

The present trend towards official secrecy within the government—over classification, executive privilege, etc.—makes the preservation of inside informants doubly critical. Arthur Schlesinger in a recent speech said that the "secrecy system has become much less a means by which government protects national security than a means by which government safeguards its reputation, dissembles its purposes, buries its mistakes, manipulates it citizen, maximize it power and corrupts itself."

In case after case, government secrecy seems to be aimed at just these ends, and not true national security. Our nation's security as a functioning democracy can not tolerate over-protected government, hidden purposes, unknown errors, a silent and manipulated people, or power corrupted by lack of public challenge and accountability.

As proof of Professor Schlesinger's indictment, a government witness in the Ellsberg case said recently that even a geography book could help a foreign power. That is only an illustration of government's exaggerated desire to shield itself and what it is doing from the press and from us. If they dared, they would hide everything, and they often seem to try.

If the disclosure of inside information to the public is not to be totally shut off, it is essential that the insiders not be discouraged from disclosing illegal or ill-advised conduct to the press.

While the administration has made great efforts to close itself off from an intruding press, the precise question of press subpenas now involves the present administration only indirectly. By and large its official stance towards protective legislation has been one of passive resistance. The Justice Department representative, testifying before a House Committee last fall, stated that while the administration did not oppose a statutory newsmen's privilege in principle, he felt it was unnecessary. He also testified that the administration did support the Supreme Court's decision that the first amendment did not require such a privilege. President Nixon himself has indicated that he would not be opposed to some type of qualified protection for the press.

Yet more than one observer has seen a connection between the rash of federal subpenas a few years ago and the "open-season" which the Administration has apparently declared on the press. Certainly the rash of U.S. subpenas from the Justice Department and local U.S. Attorneys in 1969 and 1970 has done much to encourage similiar actions by state and local government.

The matter of protective legislation will be the subject of hearings before the Subcommittee on Constitutional Rights which are scheduled to begin next Tuesday. I am hopeful that as a result of these deliberations, we will be able to arrive at some means of extricating the press from their present dilemma and in doing so preserve the people's right to know.

I might say that I do not feel the responsibility lies solely or even primarily with the Congress. Many of the problems which the press now faces are in fact not readily resolved by legislation.

It is a matter of changing a climate of opinion, of standing up and fighting for press prerogatives in editorial columns and broadcasts—of convincing the public of the rightness of your cause.

I think the media, despite the fact that they control communications, have been reluctant to use communications at their disposal. They are in fact eager to publicize any statements by the administration which attack press prerogatives—the reporters couldn't get to the telephones fast enough to report the latest Agnew attack. But the press hesitates to use the airwaves and editorial columns to rebut, or even to identify the critical issues involved.

The press simply has to shoulder the lion's share of the burden. Congress is not always aware of your problem and not always capable of coming to your defense.

But even beyond the question of the press mobilizing public opinion to defend joint press-citizen rights under the first amendment, is higher responsibility. The press is given a great right under the First Amendment to be free from government constraint. Along with that great right is a great burden. The press may not come looking for government help when the going gets rough.

Generations of press champions faced fine, jail and even worse to create the rights we now recognize as so dear. They expended much suffering and received much abuse from courts, kings and legislatures. It is no sign of a valiant, pugnacious, courageous press that in the 8 months since the *Caldwell* case we have seen so much petitioning for legislative help. The Justice Department was more than a little correct when it warned that the same Congress which protects your rights can later take them away. The first and primary defense of a vigorous press must always be the press itself—reporters, editors, and publishers.

We have been talking about the intimidating confines within which the press now finds itself. How effective these confines actually are in terms of stifling the press we will never know. Every reporter can cite examples of stories which haven't been written due to the reluctance of sources, the fear of being too critical of governmental policy or officials, or of being too controversial, or for fear of involvement in court action. But the fact that we cannot precisely identify our loss, does not mean there is no cause for concern.

I see in these examples a decided shift in the government's attempt to influence and control the media. The government, couching its tactics in terms of correcting "a bias" and "irresponsibility" in press accounts, seems to be making significant inroads into what was once the domain of the press.

I would certainly agree that elimination of bias and irresponsibility from the news media are legitimate and desirable objectives. But it is not up to government to determine what is "bias" and what is "irresponsible." The determination of truth is a personal thing. One man's bias may be another man's truth. The first amendment simply does not give government the power to determine the information to which the public should be exposed. If we have a free press, then it follows that it will not always be "responsible." Any attempt by government to make it more "responsible," inevitably makes it less free.

It is clear that the press does not always live up to the standards which editorial writers like to ascribe to it. I doubt if anyone in this room feels that any of the nightly news programs or weekly news magazines is totally unbiased. But what might appear to some as a smirk on the face of Walter Cronkite, might appear to others as an indication of sympathy. Bias, like beauty, is largely in the eyes of the beholder.

If you don't think a television news show represents the truth, you can turn off your TV. If you don't think a magazine represents the truth, you can cancel your subscription. You have the right to expose yourself to whatever information you want. But to have the government prescribing what the truth is or limiting the information available for the citizen is contrary to the first amendment.

Hopefully, where the public is given inaccurate or misleading information, there will be additional information forthcoming which will expose the earlier deception. Certainly the myriad of electronic and printed media which we have in this country today makes prompt corroboration or condemnation more likely than ever before.

Still, it may not happen. There is a risk that the wrong information will be relied upon, the wrong voice listened to. But, to my mind, it is a risk that we must take—a risk that a truly free people must take—to insure that their right to express themselves is not lost.

Alexis de Tocqueville in 1835, after observing the operation of American democracy, wrote that the press, despite its penchant for abuse, should not be restrained. "There is no medium," he said, "between servitude and license; in order to enjoy the inestimable benefits that the liberty of the press ensures, it is necessary to submit to the inevitable evils that it creates."

This is an eloquent and wise statement. You either have a free press or you don't. There is no middle ground—no room for qualification and no room for an officially sanctioned version of the truth. It is a cruel deception that we sometimes play upon ourselves that because the first amendment says we have a free press, that we in fact do. Press freedom is only as real as the conditions which are imposed upon it. We must be conscious of the signals which indicate it is endangered.

CORRESPONDENCE

TERRE HAUTE, IND., *March 6, 1973.*

Re: Reporter/informant privileged immunity

Senator SAM ERVIN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: With the impending legislation concerning anti-immunity between reporter and informant, I feel it necessary to add my two cents. Being a former informant in a most spectacular and bizarre web of circumstances involving the brutal shotgun assassination of two prominent San Francisco labor figures; union officials Dow Wilson of the Painters' Union and Lloyd Green, also of the Painters' Union, I collaborated, as an undisclosed informant, with a newspaper reporter in the successful apprehension and conviction of their killers. These tragic murders gained national news attention prior to their solution and quite possibly would not have been solved had it not been for my cooperation and willingness to assist. If it had not been for the assurance, initially, of the reporter, Charles Raudebaugh of the *San Francisco Chronicle*, that my identity would not be revealed, I would never have consented to divulge the information and lend assistance to the police and the district attorney. His assurance of immunity was the only reason I volunteered. What I told this reporter confidentially was protected throughout. I would not have consented to divulge anything to him under a limited immunity and if I had thought the courts could compel him to reveal his source of information at the time, I would have refused to cooperate. It was too dangerous to me and my family.

Since 1968, after all this happened, I moved from San Francisco and, searching a new identity, settled in the midwest to raise my family. Though the experience is far behind me now, I feel it a duty and an obligation to voice my opinion on such an important decision; stripping the most valuable instrument of immunity from the reporter, thereby hog-tieing what might be the truth. An informant has nothing to gain when he volunteers something under immunity. I would like to do my part in preserving it.

In the event my qualified experience can lend to or assist in a judicial decision regarding the preservation of this very important immunity, I would be only too happy to come to Washington and testify to it. I have been assured by Charles Raudebaugh, the reporter for the San Francisco paper, that my voluntary offer will not be ignored.

Sincerely,

WALLACE CHARLESTON.

SUBURBAN NEWSPAPERS OF AMERICA,
Washington, D.C., March 5, 1973.

Hon. SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: This letter is relative to legislation being considered to protect the confidential news sources and unpublished information of bonafide news reporters, editors and publishers and to state the position of this organization regarding such legislation.

Suburban Newspapers of America is a non-profit trade association representing the interests of thousands of weekly and small daily community newspapers published in the suburbs of America's metropolitan cities. It is conservatively estimated that more than fifty million of these newspapers are regularly delivered to suburban households where they are read with considerable interest for their local community news content.

In meeting their obligation to the public as a valid news source, the reporters, editors and publishers of suburban community newspapers each day of their professional lives cope with the problems of protecting news sources as do the reporters of all other mass communications media. Conversely, their news sources, when cricumstances warrant, rely on the integrity and confidence of these reporters and editors in making important news available to them for publication.

It is not our intention here to reiterate the many reasons why we feel this confidentiality is a vital cornerstone of a free press in a free society. We are aware that ample testimony of this fact is being presented to the Congress by the National Newspaper Association and other organizations and individuals concerned with preserving a free press. What we do wish to establish for the record is the fact that suburban and urban community newspapers rely just as heavily on the principle of news confidentiality as do all other viable news media in meeting their responsibility to the public's right to be informed.

Moreover, it is not our intention to offer or suggest precise language to establish legislation in this regard, but rather to state a general principle that we feel must be guaranteed in order for any legislation to be effective.

To this end, it is our conviction that the adopted legislation must provide absolute protection, without qualification, to the confidentiality of unnamed news sources and unpublished information in the possession of a bonafide reporter, editor or publisher for the purpose of public dissemination before any governmental body, whether that body be the legislature, judicial or executive branches as well as their departments and agencies, including grand juries. Also, it is our conviction that any legislation which the Congress shall adopt should be confined to those divisions of the Federal government, leaving the matter of news source protection at the state and local levels of government to the respective state legislatures for resolution.

We are dismayed at the need for legislation at all. We feel that the right of a free press under the Constitution also includes protection of news sources. But the recent jailings and harrassment by public officials of reporters acting in the line of duty and in the public interest now convinces us that this protection must be clearly and concisely stated in statute form to assure this protecion in the future to the press and to the public which it serves.

Sincerely,

EDWARD L. DARDANELL,
President.

Memorandum to Senator Mondale
From: A. Daniel Feldman

The inclusion in a reporter's privilege statute of an exception for libel suits poses real risks for the press. On the other hand, it is doubtful that there is any compelling reason for such an exception. Recent United States Supreme Court cases have reduced the number of libel actions filed. They have also made it unlikely that the identity of a confidential source is crucial to the outcome of any case.

The risk to the reporter and the news media of an exception for libel suits lies in the possibility that a libel suit may be filed primarily for the purpose of discovering who the confidential sources are. Despite the changes in the law which have made recovery much more difficult and have reduced the number of *bona fide* libel suits, it is still possible to file a libel action and keep it alive long enough to take the deposition of a reporter.

As against this risk to the press, the argument for such an exception for libel suits concerns the possibilities either that a newspaper might publish a story which it had simply invented—a story which really had no source—or that a newspaper, in reliance on a privilege, would decide to publish a story whose facts were so obviously wrong that the newspaper must have known that the story was false.

In the first situation the answer is simple. None of the proposed statutes confer immunity against made-up stories, because the reporter still must reveal whether he had a source. Nothing in the legislation confers a privilege of not answering the question, "Did you obtain this 'fact' from another person?"

It is also quite unlikely in practice that the existence of the newsmen's privilege would protect a story which the newspaper knew was probably false. I phrase the question that way because the line of cases beginning with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), have made it quite clear that everything a newspaper publishes which is likely to be libelous is also privileged, and can result in liability only if the statements were known to be false, or the publisher had a high degree of awareness that they were probably false, *St. Amant* v. *Thompson*, 390 U.S. 727 (1968).

These cases have severely limited the number of libel suits. They also make it possible to dispose of most libel suits at an early stage—usually by summary judgment, instead of going through a full-scale trial. Limitation of the burden, expense, and potential harassment caused by the filing of a libel suit has been the direct gain accruing to newspapers from the *New York Times* rule. The indirect gain, in my view, has been an increase in the ability to cover local governmental news with gloves off, and a corresponding increase in the degree of openess found in the conduct of local affairs.

Any exception for libel cases would apply in very few bona fide cases. While there are no longer many libel cases, most which are filed do not involve stories which depend on anonymous sources. A motion for summary judgment filed by a newspaper in a libel suit is usually supported by a set of affidavits showing that the publisher had good reason to believe that the story was true. Normally, one uses an affidavit from the actual source and, unless his reputation is well known, a second affidavit showing the reasonableness of having relied on him as a source. Thus, even though the cases make it quite clear that it is the plaintiff's burden to show that the publisher knew the material was false, a newspaper which wants summary judgment will make an affirmative showing of its belief in the accuracy of what it published—or at least the absence of information indicating that the material was probably false.

A newspaper which has relied wholly on confidential sources has great difficulty making such a showing. One result of that fact is that the newspapers try to avoid relying solely on confidential sources. That practical fact happens to be consistent with good journalism, because anonymous stories, and particularly stories which depend on anonymous quotations, are simply less believable to the reader than a story which can cite documents and quote real people. This means that while the total number of bona fide libel cases is small, even more rare is the case where the result of the suit turns solely on a confidential source.

The advantages of corroborating confidential sources are illustrated by a recent Eighth Circuit case, *Cervantes* v. *Times Inc.* 464 F. 2d. 987 (1972), cert. den. U.S. (1973). The trial court gave *Life* magazine summary judgment even though its reporter refused to disclose the names of some sources for its story about the Mayor of St. Louis. *Life* was able to show that it had obtained corroboration of what its confidential sources had said. In fact, *Cervantes* implies, I think correctly, that allowing the plaintiff to discover the names of *Life's* sources and to depose those sources wouldn't have aided his libel claim in the least.

Indeed, from the lawyer's point of view, for Congress to pass a statute with an exception for libel cases just after *Cervantes* has been decided will create an argument that Congress intended to reverse *Cervantes*, and that reporters are required to reveal their sources even when the lack of liability is so clear that a court would otherwise be willing to grant summary judgment for the defendant.

Moreover, while the great majority of libel cases are disposed of by summary judgment, the restrictive rule of *New York Times* make it likely that access to an informer would not materially help a plaintiff who does go to a full trial. Again, it is the plaintiff's burden to show, as part of his case, that (1) the publication was false, and that (2) defendant in fact entertained serious doubts as to the truth of his publication. The critical portion of that definition is the requirement of a showing that the publisher actually had serious doubts as to the truth of the material. That is a difficult burden to carry. A plaintiff is likely to satisfy that burden only when the publisher has been told, prior to publication, that this statement is just plain wrong, and has then refused to investigate somewhat further in an effort to find corroboration, or when the informant's story is so illogical (and again, uncorroborated) as to verge on plain nonsense. My point is that in neither of these situations is the informant's identity an important fact.

I conclude the state of the law of libel makes it unlikely that the identity of a source will be critical to any case. As a practical matter, publishers want more than uncorroborated sources who must remain unidentified, because they need more in order to end the litigation summarily. If a case does go beyond the summary judgment stage, even knowledge of who the source was is likely to do a plaintiff little good, because his burden of proof is to show that the publisher doubted his story; he is unlikely in any event to prove his case with evidence he might procure from the source.

One last point regarding the need for such an exception may be made. The basic problem is the need for a shield statute. The primary purpose of that statute is to free the reporter from the risk of Grand Jury, criminal and legislative subpoenas, for those are the sources of most subpoenas. The risk of a libel suit is one the reporter may be willing to take, once protection against other subpoenas is granted.

While the libel suit filed solely to discover who the source is remains a risk, the media will have gained a great portion of the protection they need if a statute is passed, even if it has an exception for libel suits. Despite that fact, the possibility of the libel suit filed only for the purpose of forcing disclosure of a source has, from time to time, had a chilling effect on reporters and on their lawyers. Since granting the privilege will cause little change in the probable disposition of any libel suit, no important values are preserved by writing an exception into the statute.

PAN-AMERICAN ENGINEERING CO.,
Dallas, Tex., March 1, 1973.

Senator SAM ERVIN,
Washington, D.C.

DEAR SENATOR ERVIN: Many of your constituents on a national basis have been watching with considerable interest the handling of the proposed "Shield Law" for all news media under which reporters or news media in general would not have to disclose sources of information which they disseminate.

I can only say that the irresponsibility of various segments of the press in the past several years has resulted in situations where it is more necessary than ever that news media be responsible for their actions and should be called upon to disclose sources of information. if any idea or point of view is important enough to disseminate, there is no particular reason why the recipient of this information, in this case the general public, should not be entitled to know where such data originated and the conditions under which it was provided.

As a private citizen, I feel I have every right to air my point of view on any of the national TV networks as much as any reporter. They have no God-given right to disseminate their own opinions, and if we are to have in the case of TV such a limited number of networks, then it is more important than ever that the media be held accountable in every way for what they disseminate.

The news media during its present campaign to divest itself of any control underlines the fact that it is a business like any other avocation. All business must be responsible for its product. Thousand of people are ruined in this country each year because of the irresponsible handling of the news and because in the news many people are tarred with the same brush whether they deserve it or not. The majority of news people have a smattering of knowledge about a great many subjects and very real knowledge about very few subjects.

The public does need to know, but it also needs to know how the information disseminated was fed into the propaganda network and who initiated it and on what authority. The news media needs to come under our judicial procedure just as any other business or any other citizen and should not be exempt under the law for the responsibility of its own acts.

Yours very truly,

A. G. GALT.

STATEMENT OF ROBERT W. GREENE, SENIOR EDITOR (INVESTIGATIONS), *Newsday* INC., GARDEN CITY, N.Y.

I would like to express my complete support for legislation on the federal level that would provide legal source confidentiality for qualified members of the working press.

For the past six years, I have headed a special investigative team for my newspaper. The purpose of this team has been to dig into matters of public concern which persons in the public or private sector would prefer to remain unreported and unwritten.

A prime focus of these investigations has been governmental corruption on the local, state and federal levels. Another particular aspect has been corruption in the judiciary.

The results of these investigations have been far-ranging. They include the removal of a New York State Supreme Court Justice; the passage of tough, new ethics and public-disclosure laws by the New York State Legislature; the indictment and conviction of a New York State Tax Commissioner; the indictment of 15 persons (and the conviction thus far of six of those); the removal from office of the Suffolk County (N.Y.) Water Authority Chairman; the disbanding of the Suffolk County sewer board, and the disallowing of contracts totaling more than $3,000,000. A side effect has been the ouster of the Republican-dominated boards of three towns with a population of more than 1,000,000 persons in Suffolk County and the Democrat-controlled government of neighboring Nassau County, which has a population exceeding 2,000,000 persons.

For this work we have been awarded the Pulitzer Gold Medal for Public Service, the National Sigma Delta Chi Gold Medal for Public Service (twice) and 21 other national awards.

Like most newspapers involved in this type of work, we agree, when necessary, to accept off-the-record or non-attributable information. Such information is used as an investigative aid, not as an end source. Provided with information of this kind, we are able to point ourselves towards on-the-record sources and documents which will help confirm the original source. Many of these non-attributable sources are persons who are in government themselves. Some have been in the judiciary. If the fact that they had provided us with information was known by their superiors, they would lose their jobs or, at the very least, any future chance of advancement. But frankly, without this type of information, we could not have succeeded in doing what we have done.

I know that you are already overwhelmed with detail on the valuable work done in this field over hundreds of years by the American press. But I would like to examine, in the barest terms, the reason why this area of concentration by the press has and is invaluable to our American form of government.

It is frequently the nature of our political system that the party in power in government, no matter on what level, is also the party of the person appointed to legally watch-dog that government. This is reasonable, and our political history is bright with examples of honorable district attorneys, judges and attorneys-general, who dared the wrath of their own political parties to bring official or private corruption to heel.

But in many instances this is not so. The district attorney lives in the hope that his political party will nominate him for the judiciary, or a governorship or some other higher elective office. So does the state's attorney general. And, even an occasional U.S. Attorney General. And members of the judiciary, being as human as the rest of us, dream of being tapped for higher posts in the state and federal court systems.

This is our political way of life. The entity that can wave the magic wand of advancement for these people is the party. And the people who hold other office in government—the people that these enforcement authorities must watch-dog—are also members and agents, frequently, of the same party. And here we find the nexus of our problem. In some instances these people are slow, even loath, to initiate actions against persons from their own parties; they are more willing to extend the "benefit of the doubt" to fellow party members, and, if it reaches that point, they seem more willing to compromise on penalties.

It is here, as the examples before you well indicate, that honest, non-partisan newspapers make the difference.

They not only serve to prod officials into necessary actions through the weight of informed public opinion, they also are often the first to receive information on wrong-doing from citizens who, with or without any real basis, distrust the possibility of political bias on the part of some members of the judiciary or law enforcement.

I shall not dwell on the obvious examples of the underworld informant whose life could be periled by disclosure, or the political informant from a fascist or communist country who could face the same fate. But I have worked with such sources in the past and their information has made invaluable contributions to the preservation of our American way of life.

In sum, I would say that American newspapers have and do perform a valuable public service as a watch-dog of government, individual liberties, and the human condition. This, to a great extent, has depended upon our ability to protect our news sources. When this source-confidentiality is stripped from us, as it has been by the recent decision of the Supreme Court, we are left with only two courses:

1. To end our role as public watch-dogs.
2. To go to jail.

Personally, I would choose jail. Most of the newspapermen that I know would choose jail. And America will become a parody of democracy as we all insist on uniform application of this unfair law and the jails of America literally bulge with newspapermen whose only aim was to inform their fellow citizens of public and private dishonesty.

I also believe that if the Congress of the United States, in its wisdom, grants such confidentiality of sources to the working press of America, we have an equal responsibility not to abuse this privilege. I believe that there should be one qualification. There must be a clear and reasonable definition of us as an entity. We of the press must assist the Congress in arriving at what qualifications are necessary to establish a person as a member of the press and deserving of this privilege.

Beyond this, I feel that there should be no other qualification. The policeman may abuse his privilege to carry his gun; the judge may disregard civil liberties, and the newsman may abuse his right of confidentiality. But most do not and will not. And it is to this vast majority that this privilege and responsibility should be granted without qualification.

PRINCETON, N.J., *March 1, 1973.*

DEAR SENATOR ERVIN: In the present surge of interest in "press shield" laws I should like to offer a few observations in the hope of furthering a rational consideration of the issues. The immunity against subpoena sought for the press through these laws would provide an absolute privilege for the reporter-informant relationship that is rare in any legal system. Such an absolute privilege is enjoyed by the relationships of priest-penitent, lawyer-client, and (with limitations) physician-patient. Many other relationships in our society enjoy a right to privacy which is generally protected by law but not by any rule of absolute immunity.

What is it that distinguishes the relationships which are now privileged against subpoena? They are all based upon the right of an individual to help and advice in time of dire need, whether it be from pangs of conscience, action of the law, or sickness. This right could be frustrated by the fear that the privacy of the relationship could be forced open. A near-absolute privilege in these cases is clearly in the public interest, in view of the fact that anyone can find himself in such dire need at some time. The only aim of the privilege is the secrecy of the relationship involved.

The reporter-informant relationship is completely different in nature. The informant is not an individual in dire need and is not turning to the reporter for personal help and advice. The only avowed aim of a press shield law guaranteeing absolute secrecy to this relationship is the paradoxical one of ensuring openness of the press.

It should be noted that no freedom guaranteed by the Bill of Rights is or ever has been absolute. Freedom of the press is limited by laws on libel and (until recently, at least) obscenity, freedom of assembly by laws on conspiracy and disruption, freedom of religion by a ban against polygamy, to cite but a few examples. The various freedoms may, and often do, conflict. Each right or freedom must be subjected to reasonable limits in order that other rights and freedoms not be compromised. The general rule is that each right or freedom is to be enjoyed subject to some requirement or responsibility, with irresponsibility tolerated where no other right or freedom is impaired. An absolute shield law that would interfere with the libel laws would trample on other rights in the name of the First Amendment. It would hamper legitimate law enforcement. Such a law would certainly encourage or invite press irresponsibility (perhaps not on the part of the New York Times).

We should note that other investigators of various kinds, ones that could certainly not be classified as members of the press, are up against the same difficulty of credibility with respect to informants. An example is a university scholar, preparing a doctorate thesis or a book; another is a private detective on a legitimate assignment; another is an investigator working for a public-interest foundation (e.g., a Nader "raider"). Many types of quests for information are legitimate and in the public interest, and all may be somewhat constrained by the possibility of a subpoena. Should these all be absolutely shielded, or should the press be singled out for the grant of an exclusive privilege? Can a sharp distinction between press and nonpress investigators be made?

The difficulties of subpoenas and the threat of contempt citations that reporters have been subjected to are indeed real. The power of the subpoena has not always been used in a responsible manner. Some remedies are called for, but it is questionable that a press shield law is the appropriate answer. An inappropriate remedy can cause more problems than it solves. In this case, an appropriate remedy desirably should be consistent with the traditional openness of the press and should not in any way encourage press irresponsibility.

One approach to finding appropriate remedies is suggested: The subpoena is a legal procedure (an important and necessary one). Remedies to inappropriate use of the subpoena should be primarily procedural. Restrictions on admissibility of evidence in investigative proceedings (grand jury or congressional committee) could be changed. The subpoena could be forbidden where resulting evidence is expected to be inadmissible. Rules restricting "fishing expeditions" could be tightened. The summary nature of contempt punishments without appeal, with a judge the same person as the aggrieved, should be questioned. A rapid review of a contempt citation by a procedure analogous to a habeas corpus proceeding might be made possible. In civil libel cases a refusal to name a source might be permitted when coupled with a shift in the burden of proof of malice (the plaintiff would be relieved of this particular aspect of the burden of proof in requital for a voluntary withholding of evidence by the other side). Our main point here is that many remedies other than a press shield law can be conceived, and should be considered.

WALLACE D. HAYES.

Los Angeles, Calif., *March 8, 1973.*

Re: Newsman's privilege

Senator Sam J. Ervin, Jr.
Chairman of the Constitutional Rights Subcommittee, U.S. Senate,
Washington, D.C.

Dear Senator Ervin: This letter is written after telephonic conversation with Mr. Lawrence Baskir, counsel for the above referred to subcommittee.

By this letter I am requesting the opportunity of testifying pursuant to a subpoena.

My personal experience is in connection with the so-called *Bill Farr* case. I am one of six named lawyers whom Bill Farr has repeatedly referred to, both in court and out of court. Mr. Farr has, on numerous occasions, stated that two of this group of six lawyers have committed perjury; but, Mr. Farr refuses to name the two. If his position is upheld, I may have forever hanging over my head the cloud of perjury, although I am innocent and he knows it.

The purport of my testimony, which would be available for evaluation by the subcommittee, would go to the effect heaped on a victim through exercise of an absolute, unconditional newsman's privilege: My experience has been that such exercise creates a very unhappy result to the victim.

Those advocating the absolute, unconditional privilege speak of the public's right to know; little, if any, consideration has been given to the type of effect I have indicated has occurred to me; furthermore, it is respectfully suggested that your subcommittee also consider the results that flow when the mass media form an unholy alliance with a reluctant prosecutor who, for reasons of personal political gain, refuses to prosecute crime which may embarrass him and the suppression of this prosecution is accomplished by way of the purported exercise of the newman's privilege. (See THE KANAREK TIMES enclosed herein.)

Thank you for any consideration you may give my request to be subpoenaed.

Very truly yours,

I. A. Kanarek.

Times-Democrat,
Davenport, Iowa, February 5, 1973.

Senator Dick Clark,
U.S. Senate
Washington, D.C.

Dear Senator Clark: John McCormick has referred to me your letter seeking our views on privileges of newsmen as guaranteed under the First Amendment.

As you know, freedom of the press was not written into our Constitution as any special privilege to newspeople. There is simply no other way the public has to keep watch on government.

For nearly 200 years no one in authority seriously questioned the First Amendment as anything less than a total ban on governmental interference with news coverage.

Then along came the Pentagon papers, and the subsequent decision of the U.S. Supreme Court rejecting absolute immunity.

In our opinion, the immunity must be absolute. With anything less, it is left to someone in government to determine whether a newsman's sources are shielded or not. This violates the whole purpose of press freedom.

We repeat that we are not pushing this legislation for newspapers but for the people.

We urge all Iowa congressmen to join us in pressing for congressional passage of an absolute shield law.

With best personal regards.

Sincerely,

Forrest Kilmer.

University of Southern California,
Journalism Alumni Association,
Los Angeles, Calif.
Los Angeles, Calif., March 1, 1973.

Hon. Sam Ervin, Jr.,
U.S. Senate,
Washington, D.C.

Dear Senator Ervin: The USC Journalism Alumni Association, representing more than 1000 graduates working as reporters, editors, columnists, broadcasters, writers, television and motion picture producers and teachers, urge the United States Senate to pass legislation as introduced by Senator Alan Cranston which would give newsmen an unqualified shield law.

The Board of Directors is joined by the faculty of the University's School of Journalism in our committment to the free flow of information to the public. This can not be accomplished without a newsman being able to conduct investigative reporting.

It is our firm conviction that this is a protection of the public welfare as well as a protection for those who serve the public such as our elected officials. Without a shield law, investigative reporters would be unable to probe organized crime, people who would defraud the public through unscrupulous business methods, treason and espionage against our government, and malfeasance in governmental affairs.

We urge immediate action by the United States Senate for the unqualified shield law for newsmen so that the news media can go about its work without this cloud of doubt.

Sincerely,

BEE CANTERBURY LAVERY,
President.

[From the *New York Times*, Dec. 3, 1972]

To the Editor:

The *Popkin* case is being muddled by stress on the fact that he is a "scholar." The two questions asked him, which he declined to answer, had nothing to do with his scholarship; they were explicitly directed to his nonscholarly activities as a citizen.

The distinction is vital. A scholar has an explicit obligation to reveal his sources; indeed such revelation is quintessential. Scholarly books are supposed to reveal or develop some novel aspect of truth. They are weighted down with footnotes. Such references are there to permit other scholars to examine the same sources, argue the same points and then agree with or modify the author's conclusions. Only by a complete exposure of his sources can a scholar's judgment be confirmed, modified or reversed. Even in science a scholar does not merely set down his concluding formula. He is obligated to detail the steps by which he arrived at his formulation so that others may check his accuracy.

We are driven to the ineluctable conclusion that a scholar has an obligation directly opposite to that claimed for the investigative reporter who refuses to reveal his sources. If, therefore, Professor Popkin is correctly quoted as saying, "If scholars are to be questioned without restriction about their sources" evil consequences will follow, he is talking nonsense. When a scholar steps outside his discipline to act as a publicist, a commentator or a plain citizen he has no right to hide behind his other role as a scholar; whether his activity is radical, liberal or conservative is irrelevant.

This is not to assert that the two questions were proper or to criticize President Bok's appeal on grounds of comity between government and the academic community. Those are separate issues. This communication is addressed solely to the absurd pretension that a scholar, as such, has a right to withhold revelation of his sources. That would be a betrayal of his profession.

HENRY M. WRISTON.

ON PROTECTING THE SOCIAL SCIENTIST'S SOURCES

To the Editor:

Dr. Henry M. Wriston argues in his Dec. 3 letter that the scholar, far from having a right to protect his sources, has a duty to reveal them. That may be true of historians, philologists or theologians, but it cannot be true of social scientists, such as economists or political scientists dealing with contemporary problems.

An economist who investigates the pricing practices of a particular branch of industry or of a particular corporation has to rely at least for some of his empirical data upon confidential sources in industry or corporations. If he were to reveal the identity of these sources, he would be guilty of a breach of trust and would be precluded from doing this kind of research in the future.

The political scientist who would want to probe into the validity and background of a particular policy would be in the same position. For instance, the scholar who has concluded on the basis of his understanding of history and of his general knowledge of political and military theory that a particular war cannot be won with the means employed will find his arguments greatly enriched and his confidence in the soundness of his judgment considerably strengthened if he has access to government sources supplying him with empirical data that support his judgment.

If that access is closed to him through the judicial compulsion to reveal his sources, not only will his scholarship be impaired but the public at large will be deprived of an independent source of information and judgment.

In a polity without a clearly defined opposition which, as in parliamentary systems, can compel the government to account for its actions and is identified with an alternate policy, independent scholarly opinion provides at least an outlet for the opposition to the policies of the government from within the government itself.

Frightened into official silence by the conformism that dominates the bureaucracy, the opposition is able at least privately to make its conception of truth and reason heard, relying upon the scholars to make its case for a different policy. Close that outlet and you have taken another step toward an unchecked conformism, an orthodoxy which tolerates but one truth and one reason, however false that truth and however irrational that reason may be proved to be by a recalcitrant reality.

Thus, the scholar's right and duty to protect his confidential source is not just a convenience for himself but the precondition for applying a corrective, vital for a pluralistic society, to the official orthodoxy.

By performing this function the scholar does not, as Dr. Wriston suggests, step "outside his discipline to act as a publicist, a commentator or a plain citizen." It is true that he performs a public act which may have political consequences. But he does so as a scholar by virtue of his special scholarly qualifications.

HANS J. MORGENTHAU.

STATEMENT BY HENRY M. WRISTON IN RESPONSE TO THE LETTER OF PROF. HANS MORGENTHAU IN THE NEW YORK TIMES, DECEMBER 5, 1972

Professor Morgenthau fails to draw a vital distinction; namely, between a scholar, an advocate or a commentator. All individuals perform several different functions. Each of these activities is valid, but each carries its own rights and obligations. Hence a man follows a trade, a profession, or engages in any of a wide range of occupations. He is exercising his right to work, but may, for example, be compelled to join a union by working in a closed shop. The variety of privileges on the one hand and restrictions on the other are infinite.

As a citizen he has obligations to pay taxes, accept jury duty and military service. He is entitled to vote, to choose his rulers, and to benefit by government protection. He may act alone or join with others in advocating any among a myriad of causes, and support his advocacy with all the professional expertise at his command.

He may choose, as his principal occupation, to be a scholar. That choice does not bar him from any activities appropriate to a citizen but it does lay upon him certain specific, and onerous, obligations. In his capacity as a scholar his goal is to develop new truth. As a scholar no other purpose is relevant. To that end he employs the disciplines appropriate to his chosen field of study. His pursuit of that end may well be protected by a grant of tenure as well as compensation from an institution. Moreover, dedication to that purpose entitled him to express his concepts of truth without let or hindrance, regardless of their popularity, their utility, or any other consideration. That is a sweeping privilege, unknown in many societies, but sacred in ours.

Privileges are balanced by obligations. Central to all others is the duty of the scholar to subject his concept of truth of review, criticism, and amendment by revealing all the data, the processes and all else that contributed to his conclusions. Without meeting that obligation to complete openness his claim to be a scholar is flawed.

Of course the scholar does not live in a vacuum. His enquiries may have been suggested or stimulated by any of an infinitely wide range of questions—political, social, economic, physical. What sets his labors apart from those of others motivated to action by the same stimuli is his single minded goal—the search for truth. Any who "beat a path to his door" should not seek a better mousetrap, only some new facet of truth.

That distinction in no way denigrates research designed to have economic utility, political effectiveness or social benefits, such as Professor Morgenthau mentions. Studies of that kind many require great knowledge and skill—add relevant nouns to taste. But whatever their value, so long as the pursuit of truth is not the sole objective, the author is not functioning as a scholar in this particular phase of his activity. Neither heights, nor depth, nor any other creature—including the First Amendment—can alter that reality.

In seeking action there is an inevitable bias in favor of those facts and those arguments which favor support of a proposal. There is equal pressure to downgrade or repress data and reasoning which point in a different direction. Reform, or monetary profit may result from this distortion, and in those pursuits secrecy regarding sources may well be not only tolerable but essential.

Nonetheless it is a patent deviation from the objective and the method of the scholar, who, in his pursuit of truth must eschew partisanship, advocacy, or other distractions. Above all the scholar must not resort to secrecy which ineluctably balks review, criticism, and amendment of his conclusions. In the nature of his profession, while pursuing it he is set apart in a sort of antiseptic cocoon. In this respect he may be compared to a surgeon in the operating theatre. He is in a mental environment as the surgeon is in a physical environment different from that of his other activities.

All men spend much of their lives outside the area of their central professional preoccupations. Some of their other pursuits may be—particularly in the short run—more immediately and obviously valuable. It is not necessary to argue that one activity is inferior to the other. They are just different. Both may be in the public interest. Both properly receive recognition and reward. But when those desirable results flow from action as a publicist, a commentator, an advocate they should not be confused with those which arise from his role as a scholar.

HENRY M. WRISTON.

I should emphasize that this statement was written prior to the publication in the *New York Times Magazine* (Sunday, February 4, 1973) of an article by Theodore Draper. His essay illustrates one aspect—among many—of the evil that arises from the failure to observe the distinction upon which I have insisted.

LAKE SAN MARCOS, CALIF., *January 19, 1973.*

Senator SAM J. ERVIN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SIR: This is written to you in your capacity as chairman of a subcommittee conducting hearings on bills on newsmen's privileges.

I have read and heard the comments of several Congressmen urging members of the public to express to their representatives their views on shield legislation for newsmen. The fact is that the public is uninformed about the issues. Even a spot check of daily newspapers should prove that there has been a barrage of articles and editorials favoring shield legislation and an apparent withholding of opposing views. Certainly in this area the press is not fulfilling the much proclaimed "people's right to know", and certainly this biased and unfairly weighted treatment is as disturbing as the alleged repression which shield legislation purports to correct.

I trust your subcommittee will ponder the legal morass into which shield legislation leads us. For example, why should not similar protection be afforded free lance investigators like Ralph Nader, or political reformers like John Gardner, or ordinary citizens who write letters to editors or distribute handbills or make public speeches relating information from confidential sources? Constitutionally, how can a shield be granted to newsmen but denied to other citizens who disseminate information? Can freedom of the press be given a preferred position without relegating free speech to a deferred position?

Other obvious questions which have been virtually ignored by the press are:

How can the public judge the trustworthiness of news gathered by the media from anonymous informants or secret sources? Would shield legislation encourage irresponsible newsmen to obtain information by theft or bribery, and would it impede their criminal prosecution? Would not newsmen be protected by shield legislation if they committed the Watergate burglary, were not apprehended, and asserted privilege after publishing the information obtained? Bearing in mind the liberalism of our libel laws, what is to prevent a reporter from creating a fictional story, then claiming privilege when its source is demanded for purposes of refutation? (Certainly, this should deeply concern a politician or other public figure.) Is there not cause for grave aprehension about the situation where a reporter asserts privilege after obtaining confidential information from one of several persons privy to such information, leaving the innocent persons under suspicion of breach of trust. (This is not hypothetical, as witness the cloud over the credibility of the six attorneys in the Bill Farr case.) Should a privilege so susceptible to abuse be granted a profession which has no generally recognized or defined code of ethics and no structure or means of enforcing standards or disciplining members? How do proponents of the legislation propose to protect the public, institutions and individuals from abuses of the privilege?

Proponents contend that news sources will dry up unless protected by shield legislation. As the reporter-informant privilege was unknown at common law and has been recognized but recently by statute in a few states, why did not news sources dry up long ago? Is a free flow of news encouraged by a reporter's agreement to keep secret the identity of his informant, or does such an agreement deny the public knowledge of an essential element of news (the source) and constitute a form of censorship by the press in the guise of freedom of the press? Is a reporter who enters into such an agreement like the lazy or incompetent detective who finds it easier to coerce a confession than to conduct a thorough investigation? Does not such a bargain prostitute the reporter's investigative role?

The foregoing questions little more than exemplify the grave political, legal and ethical issues surrounding the proposed legislation. In the absence of a fair and open-minded presentation of the issues by the press, the public must look to your committee to assure that the issues are fully defined and publicized and that the public's right to know and express itself knowledgeably is protected and enhanced.

Respectfully,

JOHN G. O'BRIEN.

CC: Rep. Robert W. Kastenmeier

MEDALLION BROADCASTERS, INC.,
KMEG-TV,
Sioux City, Iowa, February 20, 1973.

Senator RICHARD CLARK,
Senate Office Building, Washington, D.C.

DEAR DICK: Please enter my statement in the record of the Committee Hearings on a shield law for newsmen.

I can think of no quicker way to dry up the sources of information, upon which the public depends, than to require newsmen to testify as to their sources of information on stories.

There are those newsmen who object to passage of legislation on this subject as in infringement on First Amendment rights. However, it seems to me that argument has already been effectively destroyed by the Supreme Court's ruling.

Literally dozens of stories each month are the result of tips from individuals who almost certainly would not want to be identified.

To dry up these resources would be an enormous disservice to the public at large and would seriously hamper the watchdog function that electronic and print journalists serve.

Sincerely yours,

JON POSTON,
News Director.

THE DAILY PRINCETONIAN,
Princeton, N.J., February 16, 1973.

Hon. SAM ERVIN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: As the student journalists publishing Princeton University's independent daily campus newspapers, we are highly concerned with the recent attacks on the rights of newsmen and the press in general.

We are also aware of a number of bills, including the Cranston-Waldie Bill and several similar bills, which would further the protection of newsmen from revealing sources.

We urge the Judiciary Committee's Subcommittee on Constitutional Rights to recommend passage of the Cranston-Waldie Bill and to ensure that its provisions extend to student journalists as well.

Even at the college level, journalists are increasingly coming under fire and severe pressure in their role of upholding the public's right to know. Student journalists deserve the same protection extended to non-students and we hope that the Subcommittee on Constitutional Rights will include protection provisions in any forthcoming newsman's legislation.

Sincerely yours,

DAVID ZIELENZIGER, *Chairman.*

OTHER MATERIAL

DEPARTMENT OF JUSTICE, MEMORANDUM, MARCH 1, 1973

Re: Department of Justice Requests for Subpoenas to Newsmen Since the suance of the Attorney General's Guidelines in August 1970.

This memorandum summarizes the actions of the Department of Justice with regard to requests for the issuance of subpoenas to newsmen since the issuance in August, 1970 of the Attorney General's "Guidelines for Subpoenas to the News Media." Following brief discussion of the general experience of the Department, the memorandum will outline the activities of the four divisions (Civil Rights, Criminal, Internal Security, Tax) which have been, or could likely have been, involved with subpoenas to newsmen during the more than two-year period since August 10, 1970.

Under the Guidelines there are several opportunities for a determination to be made that a request for a subpoena to a newsman is unnecessary or inappropriate. The prosecutor in charge of the investigation (usually a United States Attorney) must make a preliminary determination that the information possessed by the newsman is essential, cannot be obtained from other sources, and that in other respects the Guidelines are satisfied. No data is available concerning the number of occasions in which a federal prosecutor has made this preliminary determination in favor of not requesting disclosure of information by a newsman.

If the prosecutor has a strong interest in the production of testimony or documents possessed by newsmen, the initial step is negotiations with the newsman or news organization concerning the nature, importance and relevancy of the particular information to the pending criminal investigation. The Department does not possess information concerning the number of instances in which such negotiation has led a federal prosecutor to conclude that he should not request issuance of a subpoena to a newsman.

When negotiations with a newsman are undertaken, they frequently lead to an agreement concerning the nature and scope of the information that will be made available. Sometimes a newsman agrees to provide information voluntarily and without issuance of a subpoena. On other occasions a newsman agrees to provide the information but prefers the formal issuance of a subpoena either as a matter of personal convenience (*e.g.*, for his own records or to insure the payment of witness fees) or as a matter of professional conduct.

Since August, 1970 there have been eleven situations in which newsmen, while they were willing to testify or produce documents, preferred that a subpoena be issued. (In some of these situations, as the more detailed description indicates, more than one newsman or news organization was involved.) On five of these occasions (two in the Civil Rights Division and three in the Internal Security Division), divisions of the Department requested the issuance of subpoenas without referring the matter to the Attorney General. In the other six instances where there has been an agreement between the newsman and the Government, the Criminal Division has forwarded a request for issuance of a subpeona to the Attorney General, and in each case the request was approved.

The difference in practice indicated by this data was the result of an ambiguity in the Guidelines. The Department believes that the practice of the Criminal Division, under which all requests for subpoenas to news media are referred to the Attorney General, is preferable. The Department has issued a directive that requires all requests for issuance of a subpoena to a newsman to be referred to the Attorney General, unless the newsman is willing to testify voluntarily without issuance of a subpoena. No subpoena to a newsman has been requested since the issuance of this directive in October, 1972.

It should be noted that nearly all of the situations in which the Department of Justice has authorized a subpoena request to a newsman involved either photographs, recordings, actual commission of serious crimes, or unsolicited admissions of guilt received by a news organization. For example, a federal prosecutor may seek a newsman's photograph of an alleged incident of police brutality or a letter sent to a newspaper by a person who claims to be responsible for the bombing of a federal building. In neither of these situations is any confidential source involved, nor is there an impediment to the free flow of information to the public. In only two of the thirteen situations in which subpoenas have been requested of newsmen was a confidential source involved, and in both of those situations the information was supplied on the basis of an agreement with the newsman.

There have been only two instances since August, 1970 where negotiations with the newsman were unsuccessful and a division of the Department, believing that the information was essential to a successful investigation, forwarded its request for a subpoena to the Attorney General. In each of these two instances, one from the Criminal Division and one from the Internal Security Division, the Attorney General authorized the request for a subpoena as consistent with the Guidelines.

There have been seven other situations in which the Department determined that conditions set forth in the Guidelines were not satisfied and that subpoenas should not be requested. Four of these negative determinations involved the Criminal Division and three involved the Internal Security Division. In each instance the determination was made at the division level and the matter was not forwarded to the Attorney General for his consideration.

In summary, the Department of Justice has requested issuance of subpoenas to newsmen in thirteen situations since the Guidelines went into effect in August, 1970. In eleven of the thirteen situations the newsmen agreed to testify or to produce documents but preferred the formal issuance of a subpoena. In only two situations not involving a negotiated agreement was the Attorney General asked to approve the request for issuance of subpoenas; and in each case the request was approved. In seven situations the Department determined that the issuance of a subpoena to newsmen would not be in compliance with the Guidelines and no request for compulsory process was made.

The following pages contain a more detailed description of the Department's administration of the Guidelines by the four divisions that have or may have been involved with subpoenas to newsmen under the Guidelines. The narrative statement concerning each specific situation is cast in general terms in order not to prejudice the interests of the newsmen involved or of those persons who were under investigation. The records of the Department do not indicate in every case whether the investigation resulted in an indictment or a conviction and, if a trial was held, whether the newsman testified. But an effort has been made to provide information that is as complete as possible.

CRIMINAL DIVISION

The Criminal Division reports ten different instances of involvement with subpoenas to newsmen. On seven occasions, the Criminal Division has forwarded formal requests to the Attorney General seeking his authorization for a request for the issuance of a subpoena to a newsman; all seven requests have been authorized by the Attorney General. In six of those instances, the publications or newsmen involved indicated a willingness to provide information but requested issuance of a subpoena. On one occasion, a request from the FBI for the issuance of a subpoena was denied by the Division. The final instances dealt with unauthorized subpoenas issued to newsmen who had not agreed to appear voluntarily; the action of the Department in correcting the mistakes is described below in paragraphs 9 and 10.

1. During a grand jury investigation of alleged manipulations of egg future prices on the commodity exchange, the United States Attorney for the Southern District of New York sought a request for a subpoena to be issued to certain employees of two financial publications to produce information and copies of press releases by those publications which were related to the alleged manipula-

tions. On September 3, 1971 a request for the issuance of subpoenas was forwarded to the Attorney General, and was subsequently approved by him. There is no indication in Department files whether the publications were willing to produce the requested information.

2. On September 14, 1971, several co-defendants who had been charged with the theft of United States Government property held a news conference in San Francisco. At the news conference, various incriminating statements were made by some of the defendants. The news conference was videotaped and later televised by two broadcast media. Spokesmen for the broadcasters told government attorneys that it was the firm policy of their stations to provide information only upon issuance of a subpoena, and that upon such issuance they would produce the video tapes. On November 2, 1971, the Attorney General approved a request for the issuance of subpoenas for production of the video tapes at the trial of the co-defendants, which was scheduled for November 15, 1971.

3. In relation to the investigation of the attempted assassination of Governor George C. Wallace on May 15, 1972, there was forwarded to the Attorney General on May 19, 1972, a request for the issuance of subpoenas to several television networks to produce at a grand jury investigation all films, published and unpublished, taken at the shopping center where Governor Wallace was shot. The Attorney General subsequently approved the requests for issuance of the subpoenas. Preliminary negotiations indicated that the networks were willing to produce the requested information for the investigation but requested that subpoenas be issued to them. Indictments were returned by the grand jury.

4. On May 10, 1972 a newspaper photographer photographed a demonstration at the United States Post Office in Madison, Wisconsin, at which a Postal Service employee was assaulted. Production of the pictures taken by the photographer was sought at a subsequent grand jury investigation. He was willing to produce copies of published photographs for the investigation, but indicated that he would like to be issued a subpoena requiring production of unpublished photographs. On June 9, 1972, the Attorney General approved a request to subpoena the photographs.

5. On July 6, 1972, a reporter and cameraman of a television station conducted an interview in the Arizona desert with certain members of the "Sons of Liberty," a right-wing militant group. Certain portions of that interview were subsequently broadcast by the television station. The United States Attorney's office in Phoenix sought to have the station produce at a subsequent grand jury investigation 500 feet of film and tape recordings which were not used on the air and were believed to contain assassination threats against certain government officials. The station indicated in negotiations with government prosecutors that they would provide the information but requested the issuance of a subpoena. On August 2, 1972, the Attorney General approved a request for the issuance of a subpoena for the production of the film and the tape recordings.

6. A federal grand jury was convened in mid-1972 to investigate certain irregularities that alleged occurred at the polls in Chicago during the March 21, 1972 primary election. Prior to newspapers publication of a story on these irregularities, a reporter and his editor came to the U.S. Attorney and offered to make information available. The Attorney General approved a request, forwarded to him on August 19, 1972, for the issuance of a subpoena to the newspaper reporter to appear and testify before the grand jury investigating voting frauds. The grand jury investigation recently resulted in the indictment of approximately 40 persons for federal voting law violations.

7. During a May 21, 1972 demonstration in Washington, D.C., several FBI agents were allegedly assaulted while attempting to arrest certain demonstrators. On September 13, 1972, the Attorney General approved a request for the issuance of subpoenas to two news-gathering organizations to produce negatives and photographs of the events of May 21, in connection with a grand jury investigation of the incidents of that day. The news organizations requested the issuance of the subpoenas prior to their production of the negatives and photographs.

8. In 1971, the FBI requested attorneys in the Criminal Division to consider a request for a subpoena to certain broadcast media for unreleased film footage of the events surrounding an alleged attack on President Nixon during a visit to San Jose, California. It was determined by the Criminal Division at that time that a sufficient showing of a need for the issuance of a subpoena had not been made, and the request by the FBI was declined. The matter was not referred to the Attorney General for consideration.

9. A Puerto Rican newspaper printed an article in 1972 which alleged that an employee of the National Labor Relations Board had accepted monies from one party to a labor dispute in exchange for siding with that party in the dispute. Without prior negotiations with or an expression of voluntary compliance by the reporters, the United States Attorney's office in Puerto Rico subpoenaed the reporters from the paper to appear at a grand jury investigation of the matter. The Criminal Division immediately informed the United States Attorneys' office that the Attorney's General's Guidelines had not been complied with, and the United States Attorney promptly postponed the investigation and notified the subpoenaed reporters that their attendance under the subpoena for the original date was no longer required; the reporters have not subsequently been re-subpoenaed.

10. In November of 1972, the Criminal Division was contacted by the United States Attorney's office for the Eastern District of Illinois, which is conducting an investigation of gambling activities at a pocket billiard tournament in Illinois. The tournament was raided by the Internal Revenue Service and cameramen from a major TV network were present and filmed the raid. A subpoena was issued by the United States Attorney's office to have the cameramen produce the film for a grand jury investigation of the matter. The Criminal Division directed the United States Attorney's office to quash the subpoena and to forward a request for formal authorization to the Department if the films were still desired for the investigation. The subpoena was quashed; a formal request for the authorization of the Attorney General has not yet been forwarded to the Department by the United States Attorney's office.

INTERNAL SECURITY DIVISION

The Internal Security Division reports eight instances involving the issue of subpoenas to newsmen. On one occasion, the Division forwarded a formal request to the Attorney General seeking his authorization of a request for the issuance of a subpoena to a newsman; that request was authorized by the Attorney General. On four occasions, the Division decided that the issuance of a subpoena was not essential or sufficiently justified by the particular facts involved. On two occasions, the newsmen agreed to provide information but requested the issuance of a subpoena, which was then issued. On another occasion, certain newsmen agreed to provide information at trial, and subpoenas were subsequently issued.

1. In 1970, a student publication at the University of Wisconsin published an article which indicated that certain persons had identified themselves as the bombers of the Army Mathematics Research Center on the campus. A subpoena was originally requested by a U.S. Attorney on the erroneous assumption that student publications were not included in the news media subject to the Guidelines. The subpoena was quashed and authorization from the Attorney General was sought and obtained in September, 1970 for a request for the issuance of a new subpoena to an editor of the newspaper to appear at a grand jury investigation of the matter. The editor was not called to testify because he had already been sentenced to jail for contempt for failing to testify before a local grand jury investigating the bombing.

2. In April, 1971, in conjunction with an investigation of certain possible violations of federal law relating to the teaching of the use of explosives for use in a riot, the United States Attorney's office for the Southern District of Florida asked the Internal Security Division to consider a request for the issuance of subpoenas to eight newsmen who had on previous occasions interviewed possible individual defendants in the case in relation to the involvement of themselves and their organizations in certain criminal activities. The newsmen were employed by various news-gathering organizations. The Internal Security Division decided that a showing of necessity sufficient to satisfy the Guidelines had not been made and denied the request. The matter was not formally presented to the Attorney General for his consideration.

3. In June, 1971 a grand jury in the Eastern District of New York was investigating a break-in at a federal building in that district. There were indications that a newspaper reporter had received a telephone call relating to facts sur-

rounding the break-in. Deciding that the conditions of the Guidelines could not be satisfied at that time, the Internal Security Division decided not to seek authorization for a subpoena request. The matter was not presented to the Attorney General for his consideration.

4. In early 1972, grand juries in New York, Illinois and California conducted investigations of certain bombings of banks and other violations of federal law that occurred on July 16, 1971 in New York, Chicago, and San Francisco. Eleven newsmen employed by various news-gathering organizations received correspondence containing information relating to the incident. It was decided by the Internal Security Division that there was insufficient necessity at that time to justify subpoenas to the newsmen involved. The matter was not referred to the Attorney General for consideration.

5. The Internal Security Division, in the course of an investigation of bombings in the Los Angeles area in July, 1971, and in April, 1972, had discussions with three Los Angeles newsmen who agreed to testify before a May, 1972 grand jury investigation of the bombings. Subpoenas were issued to the three newsmen for the purpose of assuring their expenses. The formal authorization of the Attorney General was not sought.

6. In connection with separate break-ins in October, 1971 at three federal buildings in New York State, two newsmen who had been contacted by persons who alleged that they were responsible for the break-ins agreed to appear before a March, 1972 grand jury investigating the incident. The newsmen requested the issuance of a subpoena prior to their appearance, and the subpoenas were issued. The formal authorization of the Attorney General was not sought.

7. A grand jury in the District of Oregon returned an indictment on April, 1972 against a defendant for violation of the Gun Control Act of 1968. No newsmen were subpoenaed to appear before the grand jury, but four newspaper reporters agreed to testify at the trial concerning their receipt of letters claiming credit for a firebombing related to the gun charges. Subpoenas were issued to the newsmen; the formal authorization of the Attorney General was not sought. The defendant in the case pled guilty and the testimony of the newsmen was therefore not necessary.

8. In October, 1972, the Assistant Attorney General in charge of the Internal Security Division denied a request by the United States Attorney in the Northern District of Ohio for authorization to subpoena a newsman employed by a radio station in Cleveland; the matter was not referred to the Attorney General. The newsman, who was also a local minister, had participated in an interview, a tape of which was broadcast in July, 1972, with four unnamed male persons in which the persons had claimed responsibility for a breakin earlier that month at a local draft board in Ohio. The minister-newsman had refused to informally provide information to the United States Attorney's office, claiming a "priest's privilege."

CIVIL RIGHTS DIVISION

The Civil Rights Division reports two instances dealing with the issuance of subpoenas to newsmen. In both instances, newsmen agreed to appear and testify concerning information in their possession, and subpoenas were subsequently issued.

1. In 1971, a grand jury in Indiana was investigating alleged assaults by prison guards on prisoners at the Pendleton State Reformatory in September, 1969. An Indiana newspaper reporter contacted the Department of Justice and volunteered information concerning events surrounding the incident at the reformatory. A subpoena was issued to the newsman for appearance before the grand jury; the formal authorization of the Attorney General was not sought. The grand jury returned indictments against nine persons in connection with the incident at the reformatory.

2. In July, 1970, a federal grand jury investigation of the shootings the month before at Jackson State University (Miss.) was commenced. Two newsmen employed by a broadcast organization in Jackson agreed to appear before the grand jury to testify concerning the events at Jackson State and to provide certain films and tapes that were in their possession. Subpoenas were issued to the newsmen; the formal authorization of the Attorney General was not sought.

TAX DIVISION

The Tax Division has not had occasion to request issuance of a subpoena to a newsman since the Guidelines were adopted.

* * * * * * *

The Reporters Committee for Freedom of the Press has compiled a list of 30 recent cases in which subpoenas, court orders or police action have allegedly threatened "the free flow of news to the public." As reported in the *New York Times* of February 18, 1973, the Committee lists nine instances where the federal courts have been involved in such action; the remaining cases involve state proceedings.

In two of the federal cases, Earl Caldwell of the *New York Times*, and Sherrie Bursey and Brenda Joyce Presley of the Black Panther newspaper were ordered by federal grand juries to provide information or sources concerning alleged criminal activity. Both of these instances occurred prior to the issuance by the Attorney General in August, 1970 of the Department of Justice's "Guidelines for Subpoenas to the News Media."

One case, involving Harvard Professor Samuel Popkin, concerned a subpoena from a federal grand jury in Boston to Dr. Popkin, who is not a newsman under the provisions of the Guidelines.

In another instance, Thomas L. Miller of the College Press Service was subpoenaed on July 27, 1971, to appear before a federal grand jury in Tucson. Upon a motion to quash by Mr. Miller, the Government's allegation that he was not a newsman was rejected by the district court and the Government was ordered to demonstrate a need for the testimony. The Government appealed, and the Ninth Circuit Court of Appeals withheld decision pending the decision by the Supreme Court in the *Caldwell* case. By the time the Supreme Court decided *Caldwell* in June, 1972, the grand jury had adjourned; Mr. Miller was therefore not recalled and the issue became moot.

In three of the instances listed by the Committee, the Department of Justice was not involved.

Alfred Balk, of the *Saturday Evening Post*, was subpoenaed by private plaintiffs in a federal civil rights case to appear and give testimony before a federal court in New York. Benny Walsh of *Life* magazine was ordered by a federal court to identify sources in a civil action for defamation. In both of these instances involving civil actions, federal appellate courts decided that there was not sufficient justification to compel the testimony of the newsmen.

THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION—AN ANALYSIS OF NEWSMAN'S PRIVILEGE LEGISLATION

In the trial of seven persons charged with the break-in at Democratic headquarters at the Watergate, counsel for the defense subpoenaed tapes and materials from the *Los Angeles Times* concerning interviews with a key prosecution witness. As the transcript of the hearing of the newspaper's motion to quash that subpoena indicates, the government was not involved in the subpoena request or issuance. Crim. No. 1827-72, U.S. District Court for the District of Columbia, pre-trial hearing of December 19, 1972.

Another listed instance involved investigative reporter Leslie H. Whitten who was arrested in Washington and charged with the unlawful possession of stolen Government documents. A federal grand jury refused to indict Mr. Whitten and charges were dropped. No question of newsman's privilege was presented by this situation of alleged criminal conduct on the part of a newsman.

The final instance involved Mark Knops, editor of a student publication at the University of Wisconsin, who was subpoenaed to appear before a federal grand jury in Wisconsin. Mr. Knops was not actually called to testify in the federal proceedings since he had already been incarcerated for contempt for failing to testify before a local grand jury conducting a similar investigation. Further details of this incident may be found at number 1 in the above description of the activities of the Criminal Division.

INTRODUCTION

On August 31, 1972, this office completed a study of the shield legislation which had been introduced in the 92nd Congress. In our present memorandum, we have made a similar study of the shield legislation which has been introduced in the 93rd Congress, since it convened on January 3, 1973 and until it recessed on February 8, 1973. The present range of proposed legislation does not differ materially from the proposed legislation in the 92d Congress. Viewed as a whole the present bills differ in both quantity and quality from the earlier preposed legislation.

During the 2nd Session of the 92nd Congress, approximately 30 newsmen's privilege bills were introduced. During the first six weeks of the 1st Session of the 93rd Congress,, 38 newsman's privilge bills have been introduced, with over 100 co-sponsors.

In general, the new bills provide greater protection than the old bills did. Only one out of five of the old bills offered an absolute protection; half of the new bills do. None of the old bills offered protection to newsmen in state as well as federal proceedings; several of the new bills do.*

Every Congressman who introduced a bill in both the last Congress and in this Congress, has afforded greater protection to newsmen under the later versions. For instance, Rep. Abzug's bill now extends its protections to independent newsmen, and Senator Mondale's bill contains more procedural requirements to be followed by a person seeking to divest the privilege.

Only a few bills have not followed the trend towards a recognized need for extensive protection. For example, Senator Weicker's bill protects only sources of information and even this privilege may be qualified by the decision of a federal court. In the Danielson bill, the privilege is extened only to persons who have employment connections with the more established news media. These two bills (and the two introduced in the House which resemble the Weicker bill) represent the only instances in which a privilege suggested by a member of Congress in this Congress less extensive than a privilege suggested by a member of Congress is in the last Congress.

GROUPING THE BILLS FOR PURPOSES OF ANALYSIS

Below is a list of the bills currently before the 93rd Congress. A notation following each bill indicates whether it is absolute or qualified and whether it is preemptive (covers state and federal proceeding) or not.

A third notation indicates a "language" group in which, for purposes of this analysis, the bill has been placed. It should be stressed that the bills in each group are simliar in language *only*. Thus, for example, Congressman Kuykendall's bill, which does not afford protection to grand jury proceedings, has been placed in the Abzug group, where the other bills afford protection to all proceedings. This is because, aside from the omission of the word "grand jury", its language is essentially the same as that of the other bills in the group. When a unique feature —such as the Kuykendall bill's exclusion of grand juries—differentiates a bill from the other members of its group, that feature is dicussed separately.

The groups are:

---

*In *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 18a (1972), the Supreme Court made the following statement:

"At the federal level, Congress has freedom to determine whether a statutory newsmans privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate," 33 L. Ed. 2d at 654.

The Court never specifically commented upon the question of whether the Congress may enact legislation in this area which is applicable to the states.

Number of bill	Introduced by	Preemptive or nonpreemptive	Absolute or qualified	Language group
S.J.R. 8	Hartke	Federal-State	Absolute	Abzug.
H.R. 717	Kuykendall	do	do	Do.
H.R. 1236	Waldie	Federal	do	Do.
H.R. 3520	do	Federal-State	do	Do.
H.R. 3741	Waldie I	Federal	do	Do.
H.R. 1735	Abzug	do	do	Do.
H.R. 2015	Hillis	do	do	Do.
H.R. 2433	Stanton I	do	do	Do.
H.R. 2584	Dellums	do	do	Do.
H.R. 2230-35	Whalen	do	Qualified	Whalen.
H.R. 3181	do	do	do	Do.
H.R. 4135	do	do	do	Do.
H.R. 2563	Bevill	do	do	Do.
H.R. 2651	Boland	do	do	Do.
H.R. 3460	Meeds	do	do	Do.
H.R. 3964	Findley	Federal-State	do	Do.
H.R. 3975	Mathis of Georgia	do	do	Do.
H.R. 4035	Mitchell of New York New York	do	do	Do.
S. 158	Cranston	do	Absolute	Cranston.
S. 367	Mondale	do	Qualified	Do.
H.R. 1813	Maraziti	do	Absolute	Do.
H.R. 2187	Waldie II	do	do	Do.
H.R. 2200	Wilson	do	do	Do.
H.R. 3143	Johnson of California	do	do	Do.
H.R. 3811	Fascell	do	do	Do.
H.R. 4275	Patten	do	do	Do.
H.R. 1749	Helstrotski	Federal	Qualified	Helstrotski.
H.R. 1985	Bell	do	do	Do.
H.R. 2101	Pepper	do	do	Do.
S. 318	Weiker	do	do	Weiker.
H.R. 3369	Coughlin	do	do	Do.
H.R. 3975	Giaimo	do	do	Do.
S. 38	Schweiker	do	do	None.
S. 415	Hatfield	do	do	Do.
H.R. 1818	Mills	do	Absolute	Do.
H.R. 1819	do	do	Qualified	Do.
H.R. 2002	Danielson	Federal-State	do	Do.
H.R. 3482	Reid	Federal	Absolute	Do.
H.R. 3595	Brooks	do	Qualified	Do.
H.R. 3725	Stanton II	do	Absolute	Do.

PART I—PERSONS PROTECTED

A newsman's privilege based on the First Amendment would, like all First Amendment freedoms, have to extend to all persons involved in the process of transmitting information, whether they be reporters, editors, film librarians or free lance photographers, public speakers and authors. *Branzburg*, 33 L.Ed. at 653. A statutory privilege, such as the ones proposed in the bills, need not have such an expansive coverage. Nevertheless, the majority of the bills introduced in this Congress, like the bills introduced in the last Congress, seem designed to extend the privilege to almost everyone who would be covered under the First Amendment.[1] Some bills deny the privilege to free lancers or independent newsmen; a few go further and deny the privilege to those not involved in the established news media.

Apparently, the bills which offer a broad protection would have no quarrel with the idea that those persons should be protected *if*, in fact, by receiving and disseminating information to the public, they "are contributing to the flow of information to the public, [they are relying] on confidential sources of information and . . . these sources would be silenced if they are forced to make disclosures to [an investigatory body]." 33 L.Ed. at 653

Although the majority of the bills seem to protect a broad spectrum of newsmen, the language used is not the same. Some bills seek to protect newsmen by not defining or even using that term; they extend the privilege to "[any] person". These bills allow the courts to reach an expansive First Amendment definition of the word "person".[2] [Helstrotski group, Schweiker, Brook] To achieve the same effect other bills rely on elaborate definitions of the word "person". Generally, these bills define a "person" to mean an individual or a legal entity, list the media with which he must be involved and/or the tasks in which he must be engaged. [Cranston group, Reid] Other bills seek a middle ground and extend the privilege to persons "employed by or otherwise associated with the news media, or independently engaged in gathering information for publication or broadcast." [Abzug group, Whalen group, Hatfield, Mills]

---

[1] In *Branzburg*, the Supreme Court noted that "the information function asserted by representatives of the organized press in the present case is also performed by lecturers, political pollsters, novelists, academic researchers and dramatists [who, therefore, could claim a newsman's privilege if we were to recognize it.] 33 L. Ed. at 653.

Apparently, the bills which offer a broad protection would have no quarrel with the idea that those persons should be protected *if*, in fact, by receiving and disseminating information to the public, they "are contributing to the flow of information to the public, [they are relying] on confidential sources of information and . . . these sources would be silenced if they are forced to make disclosures to [an investigatory body]." 33 L. Ed. at 653.

Legal Entities.—The wording of the bills which choose this middle ground sets them apart from the other bills in two ways. First, they define the tasks which a person must perform in order to be protected and, generally, these tasks are the kind that are done by individuals, not by corporations. Thus, these bills may be interpreted as extending the privilege to individuals but not to corporations—only to a reporter, but not to a newspaper. The other bills avoid this by either not defining the term "person" or by defining it so as to include all legal entities. [See Stanton I and II]

Ex-reporters.—In contrast to the bills before the previous Congress, and probably as a reaction to the William Farr and Peter Bridge cases,[3] some of the bills currently before Congress protect persons who were newsmen when they received certain information, but are not newsmen at the time they are requested to testify. Some bills do this by extending the privilege to any "person", whether that term is defined or not. Other bills do this by spelling out the fact that ex-reporters are to be considered as newsmen. [Danielson; Meeds]. The bills which protect those persons "engaged in or otherwise associated with the news media" are susceptible to an interpretation that they do not include ex-reporters. The maze of definitions in the Reid bill is susceptible to a similar interpretation, although Congressman Reid's statement upon introducing his bill makes clear that ex-reporters were intended to be included within its protections. Cong Rec. H 610 (January 31, 1973).

Independent Newsmen.—Whereas some bills may have excluded ex-reporters unintentionally, those bills which exclude independent newsmen,[4] appear to have done so deliberately. [Danielson, some of Abzug group] The exception is the Reid bill, which, if it has excluded independent newsmen, has done so unintentionally. The Abzug group bills which exclude independent newsmen have simply omitted the phrase "or independently engaged in gathering news", which other, almost identical bills, have inserted. Should Congress choose to enact a bill in which this phrasing is excluded, the resulting law may be interpreted as not extending the privilege to independent newsmen.

Established Newsmen.—The Danielson bill goes one step further than the Abzug sub-group and excludes from its protections not only newsmen who are independent, but also newsmen who are not connected with the more established press. For instance, only those newsmen who are connected with those periodicals issued at regular intervals and having a paid, general circulation are protected. The Weiker bill also limits its protections in this manner.[5]

Concern has been expressed that the drafters of the bills which include free lancers and pamphlet writers among persons protected are inviting "sham" newsmen to take advantage of the protection.[6]

---

[2] See Congressman Brooks' testimony before Subcommittee No. 3 of the Committee on the Judiciary, February 5, 1973.

[3] *Farr v. Superior Court*, 22 C.A. 3d 60, 99 Cal. Rptr. 342 (1971); *Bridge v. New Jersey*, (Superior Ct. of N.J., Appellate Div., September 12, 1972).

Both Mr. Farr and Mr. Bridge were no longer working for their respective newspapers when they were subpoenaed to testify before grand juries about stories they had written when they were reporters, the opinions of both the New Jersey and California appellate courts mentioned in dicta that Mr. Farr's and Mr. Bridge's present disassociation with the news media would prevent them from being able to claim the protection of a newsman's privilege statute. Since then, California has amended its law, which now specifically protects ex-reporters, and the New Jersey Legislature has passed similar legislation, which is awaiting the signature of Governor Cahill.

[4] An "independent newsman is basically a freelance newsman. For example—a the news media when he photographed would not be such a newsman; on the other hand a photographer who was not an employee of a news media, but who was under contract with photographer who contracted/to sell his pictures to the news media only after he had taken them would be an independent newsman.

[5] The Weiker bill is so different from all the other bills that it is not discussed in the main body of this memorandum but in a separate section.

[6] In Footnote 40, 33 L. Ed. 2d 653, the *Branzburg* majority expressed concern that a newsman's privilege recognized under the First Amendment might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be immune from the grand jury.

The answer to such concern is twofold. First, the bills which define the type of person to be protected protect that person's testimony only when it is about information "obtained in the gathering . . . of information for a medium of communication." [Cranston group] or "in his capacity as a newsman" [Reid]. Such a protection can thus be claimed by a person only when he is acting as a third party observer, when he is a conduit between the actions he observes and the public. It cannot be claimed by someone personally involved in a movement who "intends to write a book about the movement sometimes." Such a person may be "obtaining information in the . . . gathering of information for a medium of communication," but he is also—and probably primarily—obtaining it in his personal capacity as a working member of a group. It would be in this capacity that he was called before the grand jury, not in his capacity as a newsman.

Secondly, a court will surely interpret whatever newsman's privilege statute is enacted to exclude "sham" newsmen, just as it would have interpreted a first amendment privilege to exclude such persons.

PART II—PROCEEDINGS COVERED

With one exception, every bill seems designed to permit a newsman to invoke the privilege before a broad range of legal proceedings—judicial, administrative and legislative. Some bills add executive proceedings to this list. [Cranston group]

The bills display various methods of providing that testimony before a broad range of proceedings is to be covered. One method is to describe the bodies before which a newsman cannot be required to testify by means of a list of all those bodies; another method is to describe the various bodies by means of a list of general terms, such as "judicial bodies", "legislative bodies", etc.[7]

Some bills list not only those bodies before which, or proceedings in which, a newsman cannot be required to testify, but also list those bodies which cannot require a newsman to testify.[8]

Some bills state that no investigatory body shall hold a newsman in contempt. For example, the Danielson bill states that "no . . . court . . . may compel a newsman to testify." Although this phrasing is an excellent way to ensure comprehensive coverage, a court may hold that it unconstitutionally interferes with the powers of courts under the concept of separation of powers to control their internal proceedings. See *Farr v. Superior Court*, 22 C.A. 3d 60, 99 Cal. Reptr. 342 (1971).

Federal and State Proceeding.—There is one significant way in which the bills before the present Congress differ from the bills introduced before the 92nd Congress. Some of the bills before the 93rd Congress specifically apply to state as well as federal proceedings. Most of the cases in which a court has held a newsman in contempt have arisen in state courts. For example, two of the three contempt citations appealed in *Branzburg* were issued by state courts. William Farr and Peter Bridge were also held in contempt by state courts.

As the Declarations of Purpose indicate, the bills which cover both federal and state proceedings are based upon congressional authority to enact such legislation under the Interstate Commerce Clause and the Enforcement Clause of the Fourteenth Amendment.[9] In this context, it should be noted that two of the bills in the Abzug sub-group extend their privilege to "a court . . . administrative body or the legislature." [S.J.R. 8—Abzug] Given the advent of bills which cover both federal and state proceedings, bills with this general language should specify whether they are intended to cover federal and state proceedings.

The Kuykendall bill is the only bill which does not provide a comprehensive coverage of all legal proceedings. It exempts from its proceedings covered both state and federal grand juries. The clue to this exemption probably lies in the fact that the bill's protection is extended to both federal and state proceedings. As noted earlier, power granted to Congress under the Enforcement Clause of the fourteenth amendment can probably be used to enact legislation securing the guarantees of the first amendment. The Supreme Court in *Branzburg* held that, despite the guarantees of the first amendment, a grand jury could compel a newsman to testify, but left open the question of whether, despite those guarantees, any other investigatory body could compel a newsman to testify. Representative Kuykendall probably felt that Congress was free, under the authority of the first and fourteenth amendments, to enact legislation which would cover all investigatory proceedings except those before grand juries and, thus, introduced such legislation.

---

[7] If the list of proceedings is comprised of general terms, a court could construe those general terms narrowly. On the other hand, if the list is comprised of specific terms, such as "congressional committee, a court could find that an investigatory body authorized, controlled and endowed with a subpoena power by Congress, but not called a committee, is not within the proceedings covered. The use of an open-ended list, one which is prefaced by the word "*includes*" rather than the word "*means*", should eliminate to some extent the possibility of such a narrow interpretation of general terms.

[8] In some cases, the bodies or proceedings listed in each category are not synonymous. This could cause problems in interpreting the extent of the protection.

[9] The Enforcement Clause authorizes Congress to enact legislation to preserve the guarantees of Due Process. The guarantees of Due Process include the guarantees of the First Amendment; see *Grossjean* v. *American Press Co.*, 297 U.S. 233 (1936).

The effectiveness of his bill is severely limited by this exception of grand juries. His viewpoint of the powers of Congress to enact federal-state legislation in this area ignores the powers of Congress under the Interstate Commerce Clause and more specifically, the powers of Congress under the Enforcement Clause as interpreted by *Katzenbach* v. *Morgan*, 384 U.S. 614 (1966). That case states that the Enforcement Clause gives Congress the power to make its own legislative findings, even if different from the judicial finding of the Supreme Court. Therefore, despite the Supreme Court's holding in *Branzburg*, Congress may determine that newsmen should be protected from compelled disclosures before grand juries in order to insure the free flow of information to the public.

PART III—NATURE OF MATERIAL PROTECTED

In deciding which information or material to protect, the drafters of the 93rd Congress bills, like the drafters of the bills before the 92nd Congress, had to choose between a number of alternatives. These alternatives include:

(1) whether to prevent the compelled disclosure of information as well as sources of information;

(2) whether to prevent the compelled disclosure of all information or sources, or only information or sources which a person receives in his capacity as a newsman;

(3) whether to protect all information or only that information "intended for dissemination to the public";

(4) whether to protect only "confidential" information or sources.

ALTERNATIVES

With regard to the first two alternatives stated above, all the bills (except Weiker) protect both information and a source of information which a newsman receives in his professional capacity.

With regard to the second two alternatives, the bills vary.

Background Information.—Like many of the bills before the 92nd Congress, some of the bills before the 93rd Congress protect information "procured for publication or broadcast" [Abzug group; Mills], or "intended for public dissemination," [Brooks]. While this phraseology seems clearly to exclude background information, it does create a number of problems in other areas.[10]

Some bills have abandoned the idea of describing the purpose for which the information should have been collected and have opted instead to describe the activities in which the person collecting the information must have been engaged in order for the information collected to be protected. Those bills protect both background and other information.

The descriptions used by these bills are of two types—those which protect information obtained by a newsman "in his capacity as a reporter" [Danielson] and those which protect the information obtained by him "in the course of his involvement in the obtaining of news for dissemination." [Stanton II] The first type protects information obtained by a person who has achieved a certain professional status and who is acting in the manner expected of a person who has achieved that status; the other protects information obtained by a person who is acting in a similar manner, whether he has achieved any professional status or not.

---

[10] This phraseology creates an evidentiary problem; a court has to decide whether information not actually published or broadcast was procured for that purpose. This problem is not really alleviated by the addition of the phrase "whether or not actually broadcast", because a court still must decide for what purpose the information was procured.

Furthermore, the phraseology "procured for publication or broadcast" is ambiguous. It does not specify if "publication" means, as it does in libel law, "disseminated to one other person", or if "publication" means "disseminated through a news media to the public." While some of the bills before Congress retain this ambiguous terminology, others have abandoned it for the phrase "intended for public dissemination."

Neither of the ways of defining information protected is free from problems. For instance, does a reporter who observes a holdup while on his way to a press conference, receive the protection under the first type of bill? [Danielson; Reid; Brook]. Does the payroll compiled by an employee of a newspaper fall within the category of materials protected by the second type of bill? [Stanton II, Cranston group]. It is obvious from their Declarations of Purpose that neither group intends to extend its protection as far as these examples suggest, and a court interpreting them would hold accordingly.

Confidential Information.—Only one group of bills currently before Congress explicitly limits its protection to "confidential" information. [Helstrotski group] In our earlier memorandum, we assumed that the absence of the word "confidential" meant that both confidential and non-confidential information were protected. In view of a line of New York decisions, this conclusion, however, logical, may be in error. The New York newsman's privilege statute[11] protects "written, oral or pictorial information . . . concerning [newsworthy events.]" It makes no mention of whether or not the protected material must be gathered in confidence. New York state courts have rendered three decisions which indicate that they believe the requirement of confidentiality is implicit within the New York newsman's privilege statute. *In re Dan*, No. —— (Supreme Ct., Wyoming City, N.Y., September 14, 1972); *People* v. *Wolf* 69 Misc. 2d 256, 329 N.Y.S. 2d 291, *aff'd per curiam*. —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972); *In re WBAI-FM*, 68 Misc. 2d 355, 326 N.Y.S. 2d 434 (1971).

Despite the threat of similar interpretations by courts interpreting a federal statute, none of the bills explicitly protect "non-confidential" information.

Information Protected.—Unlike the bills before the 92nd Congress, some of the current bills define the term "information". [Cranston group, Reid] These bills attempt to insure that a court will not exclude from the coverage of the bill the forms of information which the drafters intended to protect from compelled disclosure. Although Webster's Third International Dictionary makes it clear that the term "information" includes everything comprised by the word "material"—specifically "data"—these broad definitions of information seem based on a not unreasonable fear that a court will construe "information" not to include material still in its unprocessed form—such as undeveloped photographs.

In an apparent attempt to achieve this same result, other bills protect from disclosure "information" nad "communication", [Schweiker] or "information and material, written or otherwise". [Mills]

PART IV—QUALIFICATIONS

Most of the bills before the 92nd Congress set forth a qualified privilege. About one-half of the bills before the 93rd Congress set forth qualifications. In many cases, it appears that the drafters of the qualified bills before the present Congress have not drafted an entire new bill, but have added qualifications onto one of the already extant absolute bills. See, for example, Mills H.R. 1818 (absolute) and Mills H.R. 1819 (qualified). The terms which are used in the current bills to qualify the privilege are practically identical to the terms which were used in the bills before the 92nd Congress.

The circumstances under which the privilege shall not apply are the same in the current bills as in those before the 92nd Congress. About half of the qualified bills before the 93rd Congress contain the defamation qualification.[12] (The Hatfield bill has this as its only qualification.) Other bills specifically exempt published information from the protection [Cranston group][13] or the identity of a person who has revealed the details of a proceeding required by law to be kept secret. [Helstoski group].[14]

---

[11] New York Civil Rights Law § 79-h (McKinney 1970).

[12] "The privilege shall not apply to the disclosure of a source of any allegedly defamatory information where a defendant asserts a defense in a civil action based on the source of such information."

This qualification is intended to cover the situation exemplified in *Garland* v. *Torre*, 259 F. 2d 545 (2nd Cir. 1958) *cert. den.*, 358 U.S. 910. In that case a reporter sued for libel raised as a defense the fact that he procured the defamatory information from a source, and attempted, unsuccessfully, to claim a first amendment right not to reveal the identity of that source.

[13] This qualification seems self-evident: if information is already published, how is it to be offered any protection from disclosure. It should be noted that under the Cranston bill, the very person from whom disclosure is sought must have published the information. In other words under that bill a newsman cannot be called upon to testify about something which he has not published, but which someone else has.

[14] See *Farr* v. *Superior Court*, supra, note, in which a reporter received and published information sealed by a court order regarding publicity. He refused to state whether the defense attorneys or the prosecuting attorneys were the source of that information, and he was jailed for contempt.

The instances when the privilege shall be divested in the bills before the 93rd Congress are, with one exception, all found in the bills before the 92nd Congress. One group of bills permits the privilege to be divested upon a showing by the person seeking the information that the information is required to prevent.

(1) threat to human life or

(2) espionage or

(3) foreign aggression [Helstotski group—see Pearson S. 1311 before 92nd Congress.] [15]

Another group of bills permits the privilege to be divested upon a showing by the person seeking the information that

(1) there is a probable cause that the protected person has information clearly relevant to a specific probable violation of the law, and

(2) the information cannot be obtained by alternative means, and [16]

(3) there is a compelling and overriding national interest in the information.[17]

[Schweiker; Mills; Whalen group—see Mondale S. 3932 before the 92nd Congress]. These are the same three qualifications which the petitioners, but not all of the amicii curiae, urged the Supreme Court to adopt in the *Branzburg* case. A final group of bills seems to seek to qualify the privilege under basically same circumstances as the petitioners in *Branzburg* urged, but by using less specificity of language. Representative Brooks' bill, for example, calls for a divesting of the privilege when, "a refusal to disclose the information would adversely affect the public safety to a substantial degree."

The Mondale bill is the only bill which divests the privilege under circumstances different from the circumstances set forth in the 92nd Congress bills. In setting forth the circumstances under which the privilege shall be divested, it combines some of those set out in the first group of bills [Helstoski; old Pearson] and some of those set out in the second group of bills [Whalen; old Mondale] and adds one more—that the proceeding shall have clear jurisdiction over the specific probable violation which is being investigated.

PART V—PROCEDURE

With the exception of the procedures in the Mondale and Weiker bills, the procedure for divesting the privilege of the new bills is no different from the procedure for divesting the privilege of the old bills. Several bills do not mention any procedure for divesting the privilege whatsoever; that determination is left to the courts. [Brooks; Bell; Schweiker] In those bills that do not mention procedure, it appears that, once a subpoena is issued,[18] a newsman can claim the privilege.[19] Then the Federal District Court, or its state equivalent, will determine, after hearing both parties, whether the privilege will be divested.

In *Caldwell* v. *United States*, 311 F. Supp. 358 (N.D. Cal. 1970), 434 F. 2d 1081 (9th Cir. 1910) aff'd sub nom. *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L. Ed. 2d 326, 92 S. Ct 18 a (1972), the petitioner, a reporter for the *New York Times* who had been doing in-depth reporting of the Black Panther

---

[15] Although these conditions seem to have been listed with the intention of assuring that the privilege would be divested only in cases involving serious crimes, the conditions are so general that they are able to be construed as to emasculate the privilege.

The privilege could be divested when the information obtained by such divestiture would relate not to the taking of human life, but to a threat to take a life. The possession of a gun or of heroin for example, could be construed as a threat. The information of the type which Earl Caldwell possessed about the Black Panthers' activities could also be construed as relating to a threat to human life.

[16] These two conditions would probably prevent the government from going on "fishing expeditions"—from subpoenaing reporters who have close contacts with dissident groups, whether or not those groups are suspected of any particular crime.

[17] Again, these conditions seem to have been listed with the intention of assuring that the privilege would be divested only in cases involving serious crime, but they are so general that they run a serious risk of being misconstrued. "A compelling and overriding" national interest can be any interest which the judiciary has in obtaining testimony. Certainly the court, in all three cases decided by the Supreme Court in *Branzburg*, could have found that "a compelling and overriding national interest" was involved in the cases before them.

[18] Although these bills do not specify whether a newsman can claim a privilege before a subpoena is issued, it is assumed from their language that he cannot.

[19] Although none of the bills specifically state whether a source could claim the privilege, it seems unlikely that he would be able to claim it. All the bills appear to confer the privilege upon the newsman for the public's benefit, so that they may receive an uncensored flow of information. Unlike the doctor-patient privileges, or the attorney-client privilege the newsmans privilege is not for the benefit of the person who relays the information.

Lipps v. *State*, —— Ind. ——, 21 Ind. Dec. 342, 258 N.E. 2d 40 (1970) presented the issue directly. The Supreme Court of Indiana made clear that "the statute creates the right personal to the reporter which only he may invoke".

Party for several years, argued that his mere appearance before a grand jury—even if he said nothing—would jeopardize his relationship with his sources. Only the Mondale bill makes clear its agreement with Mr. Caldwell's argument and takes specific steps to prevent a newsman from having to even appear before an investigatory body until his privilege is divested. This is the same way in which the Department of Justice guidelines operate. The Mondale bill states that no subpoena shall be issued unless the person requesting it proves that the privilege should be divested. The procedures enunciated in the other bills do not specify whether "the hearing for divestiture" should take place before or after a subpoena has been issued. See footnote 19, infra.

The Mondale bill is the only bill to specify that a person seeking disclosure of information or the identity of a source must apply for an order, setting forth specific allegations for divestiture; the name of the person from whom disclosure is sought, the precise information sought or the identity of the source sought, and its direct relevancy to the proceedings. An applicant is required to state "the identity of the source sought" and "the specific information sought." Obviously, he cannot state the identity of the source sought, because he is seeking to divest the privilege to learn that very information. Nor can he state too specifically the information sought. The requirement seems intended only to compel the person seeking the information to establish his need for the information he is seeking.

THE WEICKER BILL, S. 318

The Weicker bill is completely different from any other bill before the 93rd Congress.[20] Like the other bills, it seeks to strike a balance between the public's interest in maintaining a free flow of information and the public's interest in compelling a newsman to testify. However, it appears to afford less protection against compelling a newsman to testify than any of the other bills do.

Persons Protected.—The Weicker bill protects only "legitimate members of the professional news media." It parallels some of the state statutes, notably Indiana's,[21] in its concern that only persons who "receive their principal income from well-established news media" be allowed to claim the privilege.

Proceedings Covered.—The Weicker bill covers all federal proceedings. However, the privilege may be divested only by a federal district court or on appeal from the decision of a federal district court.

Nature of Material Protected.—The Weicker bill protects only a source of information, not the information itself. It is careful, however, to protect from disclosure not only the source's name, but all information which would help an investigator to discover a source's name. Under the Weicker bill, such questions as "What color hair did the source have?" or "Where did the source work?" would not be allowed.

To be protected by the Weicker bill, the source must have a confidential relationship with the newsman—his identity must have been "withheld from publication pursuant to an agreement".

Like the other bills, the Weicker bill protects only that information which a newsman receives in his professional capacity.

Qualifications.—The Weicker privilege may be divested, question by question, by the federal district court. Like many of the other qualified bills, the Weicker bill permits such divestiture only upon a showing that the information sought is necessary for the proper determination of the outcome of the proceeding in which it is sought, and can be obtained by no alternative means. Unlike the other bills, the Weicker bill does not provide that there must be a "compelling and overriding national interest in the information". Instead, it lists the specific instances when such a compelling interest will be found as a matter of law—when the proceeding is a criminal proceeding involving murder, forcible rape, aggravated assault, kidnapping, airline hijacking or a breach of national security of documents classified pursuant to federal statute or is a civil proceeding in which the source of an allegedly defamatory story is withheld. The Weicker bill specifically excludes corruption and malfeasance in office from those proceeding in which testimony can be compelled.

Procedures.—The Weicker bill requires a person who wishes to divest the procedure to follow very specific procedures, commencing with a written application containing five allegations:

---

[20] The following bills introduced in the House are identical to the Weicker bill: H.R. 3369 introduced by Coughlin: H.R. 3975 introduced by Giaimo.

[21] Ind. Ann. Stat. § 2–1733 (1968).

(1) the name of the person from whom the disclosure is sought;
(2) the news media with which he is connected;
(3) the specific nature of the source that is sought;
(4) the direct relevance of that source to the proceeding;
(5) facts demonstrating that the identity of the source is not discoverable through any alternative means.

The procedures require an *in camera* determination by the trial judge of whether or not to divest the privilege. In the proceeding to determine whether to divest the privilege, the applicant is not present and the newsman is therefore presumably free to reveal the identity of the source to the trial judge.

Citizens' Right to News Committee Position Paper on the First Amendment and the Fair Administration of Justice—Protection of Confidential Sources and Information, March 12, 1973

This position paper has been prepared by the Citizens' Right to News Committee, a non-partisan, non-profit association organized under the laws of the District of Columbia. CRNC is a national citizens committee dedicated to insuring that the public's right to news not be vitiated by requiring newsmen to divulge confidential sources and confidential information. To this end, CRNC supports a federal shield law which:

Provides an absolute privilege to newspersons, so that they will not be subjected to compulsory process and so that they will not have to disclose confidential news source or confidential information;

Extends nationwide protection, which would apply both at the federal and state level;

Would apply equally in civil and criminal proceedings; investigative and adjudicative proceedings; executive, legislative and judicial proceedings; and would extend both to confidential sources and confidential information; and

Would apply to the broadest appropriate classification of persons engaged in the collection or dissemination of news, including not only journalists for the general press but also reporters for minority, dissident, or underground press.

CRNC believes that the development of a meaningful newsman's privilege is essential—but not as special interest legislation designed only to protect reporters. At bottom, it is not the ***publication's*** interest, but the ***public's***, which is affected. As stated by one active journalist:

"Terms such as 'reporters' privilege' and 'newsman's shield,' although technically accurate descriptions of the legislation being considered, fail to cover the importance of such legislation to the public. It ought to be called 'the public's right to know' law."

Likewise, one senatorial supporter of an absolute privilege has stated that:

"For a society to be truly free, it must have a press that is truly free. The first amendment is not a piece of special interest legislation for the news industries. It is rather, a Government guarantee to a free people, without which they would not remain free for long."

The severe threat to first amendment freedoms posed by indiscriminate use of news subpoenas has been given impetus by the recent Supreme Court case of *Branzburg* v. *Hayes*, decided in June of 1972. In that case the Court rejected the First Amendment claim of newsmen that they could not be required to appear before federal and state grand juries to identify confidential sources and to provide information received in confidence.

Prior to decision, journalists had viewed with the greatest concern the possibility that the Supreme Court might reject their first amendment plea. The most comprehensive empirical analysis of the issue, conducted by Professor Vincent Blasi of the University of Michigan, found that journalists were virtually unanimous in their belief that nothing could have a more detrimental impact on source relations than a negative decision in the *Branzburg* case.

Subsequent events have borne out these fears. This paper spells out example after example of abuses of press subpoenas.

CRNC feels that Congress must take prompt action to prevent any further erosion of first amendment values. Shield legislation must be enacted. We have carefully considered the arguments for a qualified privilege. However, our study has led us to agree with the conclusions of an eminent Constitutional scholar, Professor Paul Freund, that, "It is impossible to write a qualified newsman privilege. Any qualification creates loopholes which will destroy the privilege."

CRNC favors the creation of an absolute privilege. If the need exists to protect the confidential relationship—and we believe that there can be no doubt of that—then the creation of an absolute privilege to protect that relationship is well accepted in our law. Our plea that Congress follow the well-accepted path of creating an absolute privilege is supported by the following materials.

DISCUSSION

1. The Collision of Constitutional Principles.—The debate on shield laws on the national scene is widespread and sharp. That issue ranks behind the energy crisis and impoundment of funds as a matter of the widest Congressional concern. Both the House and Senate Judiciary Committees are engaged in far-reaching hearings on shield laws. The media, not surprisingly, has given the Congressional debate extensive coverage. Most professional newsmen have supported an absolute privilege. Scholars, the Bar Association of the City of New York and various lawmakers have offered a variety of bills which would recognize a qualified privilege, defined in an infinite number of ways. The Department of Justice has opposed any legislation at all on the grounds that the Department's internal guidelines for the issuance of subpoenas by federal grand juries provide adequate protection. Some congressmen and a few columnists also support no legislation, hoping that the bizarre spectacle of a parade of reporters choosing jail rather than revealing their sources will cause the courts to overturn or sharply limit the *Branzburg-Caldwell* decision. The obbligato for this entire debate is the widely-held concern that the media, broadly, is under increasing attack. Forcing newsmen to reveal their sources, it is feared, is only the latest chapter in a pervasive attempt to curb controversial and provocative reporting.

Recognition of the public's right to have a full and unimpeded flow of news—which could be stemmed if newsmen were forced to disclose confidential sources and confidential information—raises fundamental constitutional questions: (i) On the one hand, there is the people's right to a free, unhibited, aggressive and provocative press, guaranteed by the first amendment; on the other is the right, acknowledged for centuries, of the Government to identify and develop evidence bearing upon an alleged violation of the criminal laws, with the concurrent obligation of citizens to testify under compulsory process as to facts relating to alleged crimes. (ii) Similarly, first amendments rights collide with the rights of a defendant in a criminal case, guaranteed by the sixth amendment, to compulsory process to develop evidence to assist in his defense. (iii) In addition, there is inevitable conflict between the first amendment and the sharply-limited rights that public figures now possess, under Supreme Court standards, to sue for libel (requiring proof that the publication had in effect actual knowledge that the alleged libel was false).

2. The Common Law Recognized No Newsmen's Privilege.—Although the common law developed and recognized a number of privileges designd to insure that confidential relationships would not be breached, no such protection was afforded to newsmen and their sources. Unyielding protection of news sources has been central to the traditions of the Fourth Estate, but not the courts. In contrast, conversations between a lawyer and his client, a doctor and his patient, or a priest and his penitant have traditionally been protected. The integrity of these relationships has long been deemed more important than any benefits which might accrue to the judicial process by forcing the lawyer, the doctor, or the priest to reveal facts disclosed to him in the course of such relationships.

However, in recent years, courts and commentators have been increasingly hostile to the recognition of additional privileges by the courts themselves. As Professor McCormick stated two decades ago: "The development of judge-made privileges halted a century ago. The manifest destiny of evidence law is a progressive lowering of the barriers to truth." McCormick, *Evidence* § 85.

This hostility toward development of additional privilege reflects the restrictive views of Professor Wigmore toward all privileges:

"There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restricion, not the expansion, of these privileges. They should be recognized only within the narrowest limits rquired by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." Wigmore, 8 *Evidence* § 2192–3.

Nevertheless, 17 states have found that the public interest was served by granting some statutory recognition to a newsman's privilege. Thus, these states have passed varying types of shield laws, virtually all of which protect newsmen's confidential sources. However, only a handfel presently extend protection to confidential information which was given to the newsmen. Unfortunately, state courts have often taken a very crabbed view of these statutory provisions, interpreting them in such a way as to limit sharply their protection. See Appendix A, p 35.

3. *The Sharply Increasing Use of Press Subpoenas in the 1960's.*—For many years the press and prosecutorial officials co-existed in this uncertain terrain—no common law privilege recognized in state or federal courts; no federal statute or rule recognizing the privilege; and only a few of the states with varying degrees of statutory protection. Occasionally, a celebrated case would focus the issue. Thus, in 1958 Judy Garland sued Marie Torre, a columnist for the *New York Herald Tribune*, for libel, charging that certain statements Torre published, attributed to unnamed "network executives", were false and defamatory. When asked to name her source, Torre refused; for the first time, a journalist based her refusal to reveal sources upon the first amendment. The Court of Appeals ordered her to name the source, concluding that the first amendment "must give place under the Constitution to a paramount public interest in the fair administration of justice." *Garland* v. *Torre*, 259 F. 2d 545, 549 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

In the 1960's, however, the problem took on an entirely new dimension—which led to a rapid increase in the use of subpoenas against the press. This new development has been traced by the New York City Bar Association:

"A number of social factors have contributed to the recent and seemingly growing tendency to use journalists as an evidentiary source in official investigations. For one thing, the general political and cultural fragmentation of American society today has led journalists from all media to attend more than ever before to dissident groups whose activities are likely to be of interest to investigative agencies. The press itself reflects our society's fragmentation: 'underground' newspapers and partisan organs devote themselves extensively to reporting the activities of alienated groups, which the mass media give considerable publicity to such activities. Concurrently, official corruption, bureaucratic infighting and secrecy and dissimulation at various levels of government—all of which traditionally have been the impetus for much confidential information being passed to journalists—show little evidence of recession.

"Functional developments within the media have also led more and more journalists to collect information which might be of interest to law enforcement authorities. As electronic media have become the source of most people's information about immediate, clear-cut events, the print media have turned increasingly to 'perspective' studies and investigative reporting. In the process, print journalists have adopted sophisticated investigative techniques, including extensive use of confidential informers.

"Changes in official attitudes and practices may also have contributed to the increased use of subpoenas against members of the press. Law enforcement and investigative agencies have been progressively strained in coping with the magnitude of their responsibilities. A journalist who has carefully probed official corruption or the activities of militant radicals must seem a tempting investigate aid to these pressured officials. Moreover, many journalists are deeply conerned over what they perceive to be growing official antagonism to the values which underlie the first amendment. They see in the increased use of subpoenas a technique to harass the press, and to emasculate its efforts at uncovering facts that officialdom would prefer to remain unpublicized.

"For these reasons, among others, the last few years have witnessed growing and controversial resort to subpoenas to ferret out reporters' confidential sources and information."

Thus, in increasing numbers, prosecutors have turned to newsmen as the source of information and evidence—so much so that the press felt in large measure that prosecutors regarded it only as "an investigative arm of the Government."

Time, *Life* and *Newsweek* were subpoened by federal grand juries; the four major newspapers in Chicago were subpoenaed; Earl Caldwell's subpoena was issued. Similarly, television networks were increasingly subjected to subpoena. In 1969 and 1970 alone, 166 subpoenas were directed to the three networks, often requesting tapes of materiials that had been edited out and had never been publicly shown or confidential information which had not been made public but had been developed in the course of investigative reports.

4. The Branzburg-Caldwell decision in 1972.—In the celebrated and controversial decision of *Branzburg* v. *Hayes*, decided on June 29, 1972, the Supreme Court refused to curb the burgeoning use of press subpoenas. That decision involved three newsmen who, under varying cirumstances, had given assurances of confidentiality to news sources. They all relied upon the first amendment to support their refusal to identify their sources; the Supreme Court squarely rejected that contention.

The first case involved Paul Branzburg, a staff reporter for the Louisville *Courier-Journal* who wrote two stories describing activities he had witnessed by invitation of drug users and sellers. The first article described in detail Branzburg's observations of two young persons synthesizing hashish from marijuana, from which they earned about $5,000 in three weeks. The article included a photograph showing only the hands of one of the subject of the article. The article stated that Branzburg had promised not to reveal the identity of the two young persons. Branzburg was subpoenaed to appear before a state grand jury to testify about possible violations of Kentucky law prohibiting the sale and use of drugs.

Branzburg's other story about drug use in Kentucky included recitals of conversations with and observations of a number of drug users. Branzburg was also called before the Frankfurt County Grand Jury to testify as to "any criminal act, the commission of which was actually observed by [him]." Again, he declined, basing his refusal on the first amendment and the Kentucky shield law.

The second case involved Paul Pappas, a newsman for a New Bedford, Massachusetts television station, who was assigned to report on civil disorders in New Bedford during the summer of 1970. In reporting on a Black Panther news conference, he was allowed to remain inside the Panther headquarters to cover an anticipated police raid. The Court noted that, "As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid which Pappas 'on his own,' was free to photograph and report as he wished." Pappas remained in the store for about three hours; however, there was no police raid and petitioner wrote no story and did not otherwise reveal what happened in the store while he was there. A state grand jury investigating the New Bedford disorders subsequently subpoenaed Pappas, who refused to answer on first amendment grounds any questions about what had taken place inside the headquarters.

The third case involved Earl Caldwell, a reporter for the *New York Times* who investigated and reported on the activities of the Black Panthers in Oakland and San Francisco. He was subpoenaed before a federal grand jury and ordered to bring with him notes and tape recordings of interviews given him for publication by Black Panther's spokesmen which concerned "the aims, purposes and activity of that organization." Caldwell refused to testify on first amendment grounds.

In a 5–4 decision, the Supreme Court rejected the reporter's assertion that the first amendment justified a testimonial privilege for newsmen.

Opinion of Mr. Justice White

Mr. Justice White, joined by the Chief Justice and Justices Blackmun and Rehnquist, concluded that the first amendment does not afford a testimonial privilege to newsmen:

"Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings, but uncertain, burden on news gatherings which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

Justice White's opinion gave the back of the hand to Branzburg, "who refused to answer questions that directly related to criminal conduct which he had observed and written about". As for his case, the Court concluded that, "We cannot seriously entertain the notion that the first amendment protects a newsman's agreement to conceal the criminal conduct of the source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."

The Court was more troubled where the confidential source was not observed in criminal conduct, but merely had information suggesting illegal conduct by others. The Court found, however, that the "evidence failed to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common law . . . Estimates of the inhibiting effect of such subpoeanas on the willingness of informants to make disclosure to newsmen are widely divergent and to a great extent, speculative."

Furthermore, even if there may be some negative impact upon the flow of news to the public, the Court concluded that the first amendment interests must give way to the governmental interest in collecting information on criminal activities.

In its analysis, the Court did not give priority to an interest that CRNC feels is central—that the press must be free to ferret out and publicize criminal activities and to comment—as critically as necessary—upon the response, or the failure, of public authorities to eliminate such criminal activities. This interest is, of course, particularly critical where the alleged criminal activity is official corruption.

Notably, the Court considered at some length the reporters' assertion that a *conditional* privilege was all that was required under the first amendment. The reporters had urged that the Government be required to meet three tests before compelling disclosure of confidential sources of information:

(i) That there is probable cause to believe that the reporter possesses information relevant to a specific violation of law;

(ii) That the information sought cannot be obtained by alternative means or sources other than the reporter; and,

(iii) That there is a compelling and overriding governmental interest in the information.

The Court declined, as a matter of Constitutional interpretation, to order the judiciary to administer such a conditional privilege without any guidance from Congress. The Court noted that the identification of those newsmen who were beneficiaries of the privilege would present "practical and conceptual difficulties of a high order." Moreover, the factual determinations that the requested information could not be gained from other sources would embroil the courts in intricate factual and legal determinations. But most important, in administering the third standard—whether enforcement of a particular law served a "compelling governmental interest"—Justice White concluded that, "courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not others, [courts] would be making a value judgment which a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution."

Significantly, Justice White's opinion invited Congress to enact appropriate shield legislation. Congress could make those very choices which the Court said, as a matter of Constitutional administration, it was unable to make:

"Congress has freedom to determine whether a statutory newsmen's privilege is necessary and desirable and to fashion standards and rules as narrow or board as deemed necessary to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate."

CRNC believes, of course, that Congress should most promptly accept that invitation to enact an absolute privilege law.

In passing, Justice White's opinion raised the flag of federalism, finding "merit in leaving state legislatures free, within first amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own area."

Concurring Opinion of Mr. Justice Powell

In a concurring opinion, Mr. Justice Powell holds out the hope that, in other circumstances, the Court might recognize a limited journalist's privilege based upon the first amendment:

"Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claims of privilege should be judged on its facts by the striking of a proper balance between freedom if the press and obligation of all citizens to give relevant testimony with respect to criminal conduct. . . . In short, the courts will be available to newsmen under circumstances where legitimate first amendment interests require protection."

Dissenting Opinion of Mr. Justice Stewart

Three dissenting justices, Justices Stewart, Brennan and Marshall would have adopted the conditional privilege proposed by the reporters. Justice Stewart wrote that the majority decision not only will "impair performance of the press' constitutionally protected function . . . but also will in the long run harm rather than help the administration of justice."

Dissenting Opinion of Mr. Justice Douglas

Justice Douglas, alone, argued for an absolute privilege.

Thus, four justices are clearly opposed to any privilege based upon the first amendment: at most, five justices would support some sort of qualified privilege, assuming that Powell's "enigmatic concurring opinion" would lead him to the side of the dissenters in the *Branzburg* case.

5. *In the Post-Branzburg Period, Abuses in the Use of the Press Subpoenas Have Been Particularly Noticeable At the State Level.*—The *Branzburg* decision has added substantial impetus to the use of subpoenas against newsmen, particularly at the state level. The Reporters' Committee for Freedom of Press, whose comprehensive statement is attached as Appendix A, has stated:

"While the current subpoena problem originated with federal grand juries and with state grand juries, the infection is spreading. Joseph Weiler of the *Memphis Commercial Appeal* and Joseph Pennington of radio station WREC were called before a state legislative investigating committee. Dean Jeniston, Stewart Wilk and Miss Gene Cunningham of the *Milwaukee Sentinel* and Alfred Balk of the *Columbia Journalism Review*. . . . were asked to disclose confidential sources during civil hearings before federal district courts. William Farr resisted a country judge's personal investigation into violations of his *Mason* trial publicity order.

Three St. Louis reporters appeared before the State Ethic Committee which appears to be some kind of executive committee authorized by state legislature to investigate state judges. Brit Hume of the Jack Anderson column and Denny Walsh of *Life* resisted libel case subpoenas."

Moreover, the accelerating trend is focused at the state level. As the Reporters' Committee stated.

"If statistics were the only indication, then the media would all agree that Congress should cover state proceedings because the subpoena problem is much more serious now in the states and counties than in federal jurisdiction . . . The celebrated cases today are mostly state cases: *William Farr, Peter Fridge, Harry Thorton, David Lightman, James Mitchell, Joseph Weiler, Joseph Pennington.*"

At the federal level, however, the use of subpoenas in connection with grand juries proceedings at least, has somewhat abated. In August of 1970, the Department of Justice published guidelines for subpoenas to the news media; they are set forth in Appendix B which is the statement of the Assistant Attorney General for the Department of Justice. In these guidelines, the Justice Department acknowledged that "it does not consider the press 'an investigative arm of the government.'" The Department now requires that all reasonable attempts must be made to attempt to secure information from non-press sources before considering the use of a press subpoena. Furthermore, the Department has stated it will, as a preliminary matter, attempt to resolve the issue through negotiation in every case where it concludes that a press subpoena is justified. In any event, the subpoena cannot be used for a fishing expedition; "the Department does not approve of utilizing the press as a springboard for investigation." Finally, any Justice grand jury subpoena must be personally authorized by the Attorney General and the terms must be carefully limited; it "should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material."

In the two years after these standards were published, the Attorney General authorized seven subpoenas in connection with federal grand jury investigations. However, it should be noted that the guidelines do *not* apply to federal criminal trials, do *not* apply to any civil litigation in federal courts, and have *no impact* upon the problem at the state level. Furthermore, the guidelines are *not* based upon a statutory foundation, but merely on the exercise of discretionary judgment of the present attorney general. His successor would be free, at any point, to scrap these guidelines.

6. The So-Called "Speculative" Effect of Widespread Use of Press Subpoenas.—The Supreme Court in the *Branzburg* case found that there was only "speculative" evidence as to the impact of a ruling which would require reporters to divulge their sources and confidential information. One can, however, refer to dozens of specific instances where press subpoenas have ben issued; to repeated statements by newsmen that their confidential sources are drying up; and to the virtually-unanimous perception of the issue by newsmen that press subpoenas seriously cripple their efforts to probe deeply in their investigative reporting. The Supreme Court in *Branzburg* referred to two studies—one from the Northwestern University Law Review and a second by Professor Blasi of the University of Michigan.

The first study asked a number of editors of daily newspapers how many stories were based upon information received in confidence. The answers varied significantly, and the Court acknowledged that the study did not measure the deterrence to potential informants which might be caused by press subpoenas.

The Court also referred to the findings of Professor Blasi's study that slightly more than half of the 975 reporters questioned said they relied upon regular confidential sources for at least 10% of their stories. The Court noted that, of this group of reporters, "only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected."

However, the New York City Bar Association referred to other findings of the Blasi Study; it noted that newsmen reported "average reliance on confidential sources for about one-quarter to one-third of all stories, but heavier reliance on confidential sources among more experienced reporters." *The greatest use of confidential sources involved stories about Government operations—over one-third of the stories.* The medium making the greatest use of confidential sources was newsweeklies, affecting between one-third and one-half of the stories.

The Bar Association stated that Blasi's study found journalists virtually unanimous in their belief that nothing would have a more detrimental impact on source relationships than an adverse decision in the *Caldwell* case. The City Bar Association also noted that the Blasi findings were collected *prior* to the *Branzburg-Caldwell* decisions. It concluded that "the Supreme Court's decision has doubtless increased the difficulty of acquiring confidential information, as a result of the attendant publicity and imprimatur of the Court, and reporters would now presumably be even more negative about the impact of subpoenas." The Bar Association's perceptive summary of the shield issue is set forth in Appendix C.

Recent testimony by reporters has substantiated this view. The Reporters' Committee for Freedom of the Press has stated that:

"Now, six months later, we believe we have an overwhelming factual case that there is more than a speculative danger—that censorship is here today. When newsman have to face pressure tactics by the Government, have to pay for lawyers and engage in extensive litigation and even go to jail, when sources are persuaded to release journalists from their promises of confidentiality, when Courts evade the clear intent of state confidentiality laws, censorship is here."

In support of that assertion, the Reporters' Committee presented a "Subpoena Log", a list of 64 recent censorship incidents. A copy of this subpoena log is attached as Appendix D.

In addition, in a *New York Times* article in December of 1972, Brit Hume, an investigative reporter-colleague of Jack Anderson, catalogued instance after instance of Government informants refusing to continue to provide confidential information.

William Farr, staff writer of the *Los Angeles Times*, spent 46 days in jail rather than reveal a confidential source. Farr has testified to the chilling impact of press subpoenas rulings on newsmen:

"A 23-year Government employee will not risk his job and his pension to let us know of mismanagement or corruption in his Department if we can't protect him. In reporting on the Mafia and organized crime, the source usually is worried about something even more vital, his life and limb."

He described two Pulitzer prize-winning stories which would have never been published without confidential sources:

"Two of the Pulitzer Prizes recently won by the *Los Angeles Times* were for stories which would not have been possible without keeping sources confidential. One of the prizes was received for a series of articles which exposed corrupt practices in city and county government. The basic information was provided by respected businessmen and public officials who stood to lose livelihood if they were identified. * * *

"The *Times* coverage of the Watts riots and its aftermath won another Pulitzer. Assured of anonymity, teachers talked to our reporters about the school system, policemen talked about their fellow policemen and their own behavior under great pressure. Looters talked frankly and even judges told stories they were afraid to have attributed to them. They would all remain silent today, I feel."

William Jones is a Pulitzer Prize reporter for the Chicago *Tribune*. He exposed a pattern of collusion between police and a large private ambulance company to restrict service in ghetto areas. He recently described the critical role of the confidential source in investigative reporting:

"I cannot stress strongly enough the importance of confidential sources to investigative reporters. Without them we would be hamstrung to the point where many investigations would never get off the ground. I think it should also be stressed that the term 'confidential source' as it is used in investigative reporting is not a synonym for the kinds of characters portrayed in dime spy novels.

"It has been my experience that most confidential sources are people who see something wrong or corrupt in the public or private agency where they work and merely want the problem corrected. It is usually their first time in dealing with such a situation and they arrive at the door of the investigative reporter only after exhausting every effort within their own agency to bring about changes. They are people with kids and mortgages and pride in the job they do, not plotters and spies seeking to topple governments or agencies.

"Anonymity is essential. It is frequently the first question asked by a potential confidential source in the first telephone conversation. If you can't guarantee it you will probably never hear from the source again. There are a number of reasons for this and from personal experience I could recite examples that range from murder threats to firing and professional blacklisting. I might add that all too often when an agency is hit with a scandal that appears to be the result of confidential sources they frequently devote more time to trying to find the source than correcting the abuse."

Although there are dissenting views, (such as those of columnist James J. Kilpatrick and Clark Mollenhoff, Washington Bureau Chief of the *Des Moines Register*, whose views are attached as Appendix E), the virtually unanimous reaction of the press is one of great concern. And such concern is that, ultimately, the impact of any limitation on newsmen's freedom directly affects the public. As Farr has stated:

"What we are talking about really is a necessity for a free flow of information to serve the public's right to know. The term 'newsmen's privilege' conjurs up the misconception that we want a special status unto ourselves. This is untrue. We do not want the legal right to protect sources as a favor to any newsman or all newsmen. We want such legislation to further the constructive processes of the press, so that the public will be fully and intelligently informed.

To the public, the stakes are high. As the Reporters Committee has stated:

"We ask you to consider what kind of nation we would be, for example, if the *Pentagon Papers*, the Bobby Baker affair, the thalidomide horror, the MyLai Massacre, among others, and hundreds of scandals regarding state and local government still lay locked in the mouths of citizens, fearful that they would lose their livelihoods or perhaps even be prosecuted if their identities became known."

7. *Current Congressional Consideration of Federal Shield Legislation.*—It is in this context that Congress is currently considering a broad variety of shield laws. Dozens of bills have been introduced in this new session of Congress. A House Judiciary Subcommittee has held extensive hearings. Likewise, the Senate Constitutional Rights Subcommittee has heard from many witnesses.

The two bills which represent the most current, matured considerations by Congress are annexed as Appendix F. One, introduced by Senator Ervin, who is Chairman of the Senate Committee, provides for a preemptive qualified privilege available when information was received with an explicit or implicit understanding of confidence. A newsman must also disclose the identity of a person who committed a crime in his presence.

The second bill was introduced by Senator Cranston and has the blessing of the American Newspaper Publishers Association. It is an absolute privilege bill; it extends to confidential sources, confidential information and work product. It broadly defines the persons protected by the privilege, and it creates presubpoena procedures which would minimize the occasions when newsmen would be forced to court to defend their decisions not to produce confidential information.

Throughout the legislative discussion, it has become a matter of conventional wisdom that "an absolute privilege bill would not pass." However, media witnesses have become increasingly vocal in support of an absolute privilege. It will be recalled that in the *Branzburg* case, the reporters involved were proposing a qualified privilege. However, recent Congressional testimony has demonstrated that a qualified privilege will be vexing to define, and even more difficult to administer. Indeed, one eminent constitutional scholar, Professor Paul Freund of Harvard Law School, has concluded that, "It is impossible to write a qualified newsmen's privilege. Any qualification creates loopholes which will destroy the privilege."

The concerned Congressional committees are now moving toward Executive Session to consider whether to report out shield legislation. Their deliberations will focus upon the following issues:

(a) Is there a need for legislation?

There has been virtually unanimous support from legislators, reporters, commentators and interested groups that some legislation is needed. From that perspective, the only question is what kind of legislation, not whether legislation.

The current Justice Department position, of course, opposes any federal law, trusting in the self-discipline of the Attorney General in administering the Department's guidelines. (Appendix B) Opposition also comes from two groups with differing political perspectives. First, there is a minority of congressmen that feels that no legislation should be enacted. Inasmuch as they accept the view that one cannot secure an absolute privilege, then the preferable strategic approach is for newsmen to continue to raise the First Amendment point in an attempt to secure either a Supreme Court limitation or reversal of the *Branzburg* decision. In support of that view, one can identify a number of decisions where the courts have limited the extension of the *Branzburg* principle, particularly in civil litigation.

Others who oppose any legislation feel that the very act of Congressional definition of a shield privilege acknowledges that a later Congress can limit this right. Commentators, such as Clark Mollenhof and James J. Kilpatrick, would support no legislation. (Appendix E).

On balance, CRNC is not content to wait for the slow process of identifying another case to serve as a vehicle to vindicate the significant First Amendment rights involved here, which would require shepherding that case through the long and uncertain appellate process. We think there is a need for Congress to resolve this issue now.

(b) Should the privilege be absolute or conditional?

Apart from informed speculation as to what is "politically possible," persuasive evidence has been presented in support of Professor Freund's contention that one simply cannot write an effective qualified privilege. This testimony has been captured in Senator Cranston's comment:

"Read some of the qualifications that have been proposed, singly or in combination and consider: how many potential informants will be eager to talk to the press once they realize the reporter may be compelled to testify if there is 'probable cause' to believe that the information they gave is is 'clearly relevant' to a suspected crime? Or that the evidence is 'unavailable' or 'not readily accessible elsewhere'? Or that the information must be exposed in open court 'to prevent a miscarriage of justice'? Or in the cause of 'compelling an overriding national interest' or for reasons of 'national security'?"

"All such qualifications, though intended to protect the public, are in fact self-defeating. They would hurt, not help, the public. . . . The worse the crime we want to prevent or solve—kidnaping, murder, political assassination, espionage—the more important it is that Congress produce legislation that will encourage tipsters to tell the press what they know about these crimes. To deny these sources protection against disclosure will surely mean that these sources will not risk their necks by talking. And the information we need the most—tip-offs to kidnapping or murder or political assassination or espionage—is the very information we will no longer receive."

After study, including the scholarly presentation of Professor Blasi in support of a qualified privilege set forth as Appendix G, CRNC favors the creation of an absolute privilege. If the need exists to protect the confidential relationship—and we believe there can be no doubt of that—then the creation of an absolute privilege to protect that relationship is well accepted in our law. Three hundred thousand attorneys in this country have an *absolute* privilege to protect the confidential relationships of their clients; three hundred thousand physicians receive varying degrees of protection in State and Federal courts; hundreds of thousands of clergymen are not required to divulge the content of conversations with their penitants.

No court examines whether an attorney might have received information from his client that would be relevant to, or even essential to demonstrating that a crime has been committed. The attorney-client privilege is not breached or circumscribed because a question of "compelling national interest" has been raised. CRNC believes that the protection afforded newsmen under the First Amendment should be no less than that granted attorneys.

c. Should a Congressional Shield Law Apply Both To Federal and State Proceedings?

As a matter of constitutional authority, it seems clear that Congress has the *power* to enact a shield law which would be 'preemptive"—i.e., would apply both at Federal and State level.

Such Federal authority would be based both upon the Commerce Clause and Section 5 of the Fourteenth Amendment. We concur in the opinion of the New York City Bar Association that "Congress possesses ample powers under the Commerce Clause to protect journalists from State government activities which would interfere with news gathering or dissemination." Institutions which are engaged in disseminating information to the public clearly are engaged in "commerce among the Federal states" and are thus subject to congressional regulation under the Commerce Clause. Television licensing provisions and antitrust exemption provisions for newspapers have been based upon the Commerce power.

Moreover, Congress can enact a preemptive shield law based upon Section 5 of the Fourteenth Amendment. Such power has been confirmed in the recent Supreme Court decision of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), where Congress displaced state laws in order to guarantee Fourteenth Amendment rights to equal protection of the laws, in an instance where the Court itself would not invalidate the state law in question. First Amendment freedoms have long been incorporated into the Due Process clause of the Fourteenth Amendment, and under the *Morgan* principle, we believe it is clear that Congressional authority would extend to a preemptive shield law.

Thus, the question of preemption is not one of *power*, but one of *policy*. While CRNC would support an absolute privilege bill at the State level, our strong preference is for a Federal preemptive bill to guarantee newsmen's rights. We recognize that the National Conference of Commissioners on Uniform State Laws has been considering the possibility of developing a uniform qualified privilege bill. However, our experience with this process has indicated that it simply is too tortuous, too uncertain, to vindicate promptly the public's right to a full and free flow of information. We lend our vigorous support to a preemptive Federal bill.

DEPARTMENT OF JUSTICE,
Washington, D.C., September 2, 1970.

Subject: Guidelines for Subpoenas to the News Media.
To All United States Attorneys,

The following guidelines for subpoenas to the news media are quoted from the address "Free Press and Fair Trial: The Subpoena Controversy" by the Honorable John N. Mitchell, Attorney General of the United States, before the House of Delegates, American Bar Association, at St. Louis, Missouri, on August 10, 1970.

WILL WILSON,
Assistant Attorney General,
Criminal Division.

First: The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice.

Second: The Department of Justice does not consider the press "an investigative arm of government." Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

Third: It is the policy of the Department to insist that negotiations with the press be attempted in all cases in which a subpoena is contemplated. These negotiations should attempt to accommodate the interests of the grand jury with the interests of the news media.

In these negotiations, where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the news media.

Fourth: If negotiations fail, no Justice Department official should request, or make any arrangements for, a subpoena to the press without the express authorization of the Attorney General.

If a subpoena is obtained under such circumstances without this authorization, the Department will—as a matter of course—move to quash the subpoena without prejudice to its rights subsequently to request the subpoena upon the proper authorization.

Fifth: In requesting the Attorney General's authorization for a subpoena, the following principles will apply:

A. There should be sufficient reason to believe that a crime has occurred, from disclosures by non-press sources. The Department does not approve of utilizing the press as a spring board for investigations.

B. There should be sufficient reason to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information.

C. The Government should have unsuccessfully attempted to obtain the information from alternative non-press sources.

D. Authorization requests for subpoenas should normally be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

E. Great caution should be observed in requesting subpoena authorization by the Attorney General for unpublished information, or where an orthodox First Amendment defense is raised or where a serious claim of confidentiality is alleged.

F. Even subpoena authorization requests for publicly disclosed information should be treated with care because, for example, cameramen have recently been subjected to harassment on the grounds that their photographs will become available to the government.

G. In any event, subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

These are general rules designed to cover the great majority of cases. It must always be remembered that emergencies and other unusual situations may develop where a subpoena request to the Attorney General may be submitted which does not exactly conform to these guidelines.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

Journalists' Privilege Legislation

By THE COMMITTEE ON FEDERAL LEGISLATION

The concern of many legislators about the increasing use of subpoenas to require members of the press to disclose information gathered in journalistic activities is reflected in a variety of bills seeking to prohibit or restrict the compelled disclosure by reporters of information received from confidential sources.

After reviewing the constitutional and policy issues posed by these legislative proposals, we have concluded that creation of a journalists' privilege by Federal legislation is authorized by the Constitution, and that enactment of legislation to protect reporters from having to disclose confidential source relationships would advance the fundamental values inherent in freedom of the press under the First Amendment without unduly hampering the legitimate interests of law enforcement. We believe the qualified privilege to be created by such Federal legislation should be applicable against State as well as Federal investigatory bodies, that it should be invoked only by professional journalists, and that the privilege should defer to certain carefully defined investigative needs of special urgency.

I. *BACKGROUND FOR THE LEGISLATION*

A number of social factors have contributed to the recent and seemingly growing tendency to use journalists as an evidentiary source in official investigations. For one thing, the general political and cultural fragmentation of American society today has led journalists from all media to attend more than ever before to dissident groups whose activities are likely to be of interest to investigative agencies. The press itself reflects our society's fragmentation; "underground" newspapers and partisan organs devote themselves extensively to reporting the activities of alienated groups, while the mass media give considerable publicity to such activities. Concurrently, official corruption, bureaucratic infighting, and secrecy and dissimulation at various levels of government—all of which traditionally have been the impetus for much confidential information being passed to journalists—show little evidence of recession.

Functional developments within the media have also led more and more journalists to collect information which might be of interest to law enforcement authorities. As electronic media have become the source of most people's information about immediate, clear-cut events, the print media have turned increasingly to "perspective" studies and investigative reporting. In the process, print journalists have adopted sophisticated investigative techniques, including extensive use of confidential informers.

Changes in official attitudes and practices may also have contributed to the increased use of subpoenas against members of the press. Law enforcement and investigative agencies have been progressively strained in coping with the magnitude of their responsibilities. A journalist who has carefully probed official corruption or the activities of militant radicals must seem a tempting investigative aid to these pressured officials. Moreover, many journalists are deeply concerned over what they perceive to be growing official antagonism to the values which underlie the First Amendment. They see in the increased use of subpoenas a technique to harass the press, and to emasculate its efforts at uncovering facts that officialdom would prefer to remain unpublicized.

For these reasons, among others, the last few years have witnessed growing and controversial resort to subpoenas to ferret out reporters' confidential sources and information. The Supreme Court took notice of the importance of the problem in granting certiorari in three typical instances where newsmen had refused to divulge information received in confidence. The facts of the three cases illustrate the utility of promises of confidentiality in investigative reporting, as well as the interest of law enforcement officials in being able to penetrate such promises.

In one case, a staff reporter for the *Louisville Courier-Journal* wrote two stories describing activities he had witnessed by invitation of drug users and sellers in and around Louisville. He was subpoenaed to appear before a state grand jury to testify about possible violations of State laws prohibiting the sale and use of drugs.

The second case involved a television newsman for a New Bedford, Massachusetts television station, assigned to report on civil disorders in New Bedford during the summer of 1970. Sent to cover a Black Panther news conference, he was allowed to remain inside the Panther headquarters in New Bedford to cover a raid by the police which the Panthers expected. However, the Panthers had required as a condition of entry, that the newsman agree not to disclose anything he saw or heard inside the headquarters, other than the anticipated police raid. He stayed there for about three hours, but the police did not raid, and the newsman submitted no report on what transpired in the headquarters. Two months later, a State grand jury investigating the disorders called the newsman and asked what he had seen in and around the Panther headquarters.

The best known of the three cases involved Earl Caldwell, a black reporter for the *New York Times* assigned to investigate and report on the activities of the Black Panthers in Oakland and San Francisco. Caldwell conducted and taped several interviews with Black Panther leaders, and wrote several articles in the *Times* about the Panthers' positions and activities. Caldwell was subpoenaed to appear before a Federal grand jury to testify "concerning the aims, purposes, and activities of that organization".

Each of these newsmen resisted the subpoena on First Amendment grounds, but their position was rejected by the Supreme Court. *Branzburg v. Hayes*, 408 U.S. 665, decided June 29, 1972 by a 5-4 vote.

The majority of the closely divided Court, in an opinion authored by Mr. Justice White, viewed the compelled testimony in these cases simply as "incidental burdening of the press," resulting from enforcement of civil or criminal statutes of general applicability. The majority noted that citizens generally have an obligation to tell grand juries anything they know about commission of crimes—the sole exception being the Fifth Amendment right of any witness to refuse to testify about matters that might be self- incriminating.

The reporters sought a testimonial special privilege on the basis that otherwise the flow of information from news sources preferring to remain confidential would be significantly diminished. The Court majority responded that the actual extent to which reporters needed to promise confidentiality was not clear. Not all news sources insist on confidentiality, Mr. Justice White pointed out, and most reporters are not compelled to testify even when they have received information in confidence. Moreover, the opinion speculated, informants who have insisted on confidentiality often have a substantial interest in dissemination of news which would outweigh any fear of investigation. Thus, the fear of substantial drying up of news sources was doubted. But, Mr. Justice White argued, even if some constriction in the flow of news should occur, the public interest in investigating and prosecuting crimes reported to the press should predominate.

A substantial aspect of the Court's skepticism about recognizing a journalists' privilege appears to have rested on practical and theoretical difficulties. The reporters urged that the government at least be required to meet three tests before compelling disclosure of confidential sources of information: (1) that there is probable cause to believe that the reporter possesses information relevant to a specific violation of law; (2) that the information sought cannot be obtained by alternative means from sources other than the reporter; and (3) that there is a compelling and overriding governmental interest in the information.

The majority opinion responded that the third of these tests would require the courts to make a purely legislative policy choice. Government presumably has a compelling interest in information about the violation of any and all of its criminal laws; courts are not in a position to weigh the value of enforcing different criminal laws so as to choose which are important enough to justify investigation into a reporter's confidential information. Mr. Justice White also argued that acceptance of a reporters' privilege would lead to undue confusion in defining who qualified for the privilege—a troublesome problem in light of the traditional doctrine that the liberty of the press extends to pamphleteers, lecturers, and authors of every kind, as well as professional journalists. In addition, the majority stated, whether there is probable cause to believe a crime has been committed, or whether the reporter has useful information which the grand jury cannot obtain elsewhere, pose extremely difficult judicial determinations.

Mr. Justice Powell, a member of the majority of five, indicated in a concurring opinion that in different circumstances the Court might recognize a limited journalists' privilege based on the First Amendment. The majority opinion of Mr. Justice White had concluded with an enigmatic suggestion to that effect: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification" (408 U.S. at 707-708). The majority's hint was perhaps broadened in Mr. Justice Powell's brief concurring opinion. He emphasized "the limited nature" of the Court's holding, and stated that no "harassment" of newsmen would be tolerated. But he went beyond reference to harassment. Judicial relief would be forthcoming, Mr. Justice Powell suggested, if the reporter "is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement" (408 U.S. at 709-710).

Thus, Mr. Justice Powell seems to recognize that a journalist has an important interest in protecting confidential sources, but for him the legal context is critical to balancing this interest against society's vital interest in law enforcement. He would demand a concrete record of particular questions about a specific confidential relationship before attempting to reconcile the reporter's First Amendment claim and society's interest in detection and prosecution of crime. In a footnote, Mr. Justice Powell points out that Caldwell asserted a privilege not even to appear before the grand jury unless the Government met his three preconditions. The Justice rejected this assertion that the Government's authority should be thus tested at the threshold.

If our reading of his opinion is correct, Mr. Justice Powell in a future case may join the four dissenters in upholding a journalist's claim that the First Amendment justifies a refusal to disclose confidential information.

While a closely divided Court thus rejected the newsmen's general arguments that the First Amendment creates an immunity against required disclosure of information received in confidence, the Court's judgment does not in any respect suggest limitations on the power of Congress to legislate a journalists' privilege. Indeed, the majority seems positively to invite legislative consideration of the question:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate" (408 U.S. at 706).

The fact that Mr. Justice Powell's concurrence suggests the Court might recognize a journalists' privilege in a future case, on its specific facts, does not lessen the appropriateness of legislation which Mr. Justice White's opinion recognized. Even if future cases do portend some judicial protection along the lines suggested by Mr. Justice Powell, the principles evolved would probably be highly particularistic, designed to deal with special situations. No recognition of a journalists' privilege sufficiently general to make confidentiality reliable and predictable can be expected, in light of the Court's position last June. Accordingly, legislative consideration of the problem would serve a most useful function even if we have not heard the last word from the Supreme Court.

Numerous bills have been introduced, in the last Congress and at the opening of the present one, to create a privilege for newsmen to resist official compulsion to divulge information received in confidence in the course of journalistic activities. The bills vary in many respects. Some apply only to Federal proceedings; others would create a privilege against State authority as well. The nature of the privilege is also different from bill to bill. Some grant an absolute privilege against compelled disclosure in all circumstances, others in all except libel actions, and still others lift the privilege in situations involving threats to life, espionage, foreign aggression or pursuant to subjective standards such as "a compelling and overriding national interest in the information". The bills are diverse in the information to which the various privileges attach. Some would make privileged any information gathered in journalistic endeavors. The more limited approach of other bills is to grant the privilege only as to information received in confidence, or "hearsay communications". Finally, persons subject to the statutory protection are variously defined. Some bills cover only persons employed by defined news media; others would apply to anyone who disseminates information to the public through any medium of communication, including presumably authors, lecturers, and perhaps anyone who hopes to be either.

In view of the diversity of the various substantive proposals, our analysis will concentrate on the general questions of law and policy rather than analyzing the bills one by one. As noted earlier, our conclusions are that Federal legislation to create a journalists' privilege is constitutionally authorized and would serve a valid purpose at this time, that the privilege should be applicable against the States as well as the Federal Government, that only professional journalists definable as such by an easily administered test should be covered, and that the privilege should give way to certain carefully defined investigative needs of special urgency. Each of these separate conclusions is disputable and we shall discuss them one by one. We shall first discuss the question of Congress' constitutional power to enact a journalists' privilege effective against the States as well as the Federal Government, and then proceed to the policy problems posed by what form the privilege should take.

II. *THE CONSTITUTIONAL BASIS FOR FEDERAL LEGISLATION*

A. *General Legislative Authority*

The first constitutional question raised by the various proposals to create a journalists' privilege concerns Congress' basic authority to legislate in the premises, a problem which mainly arises only as to legislation which would restrict the States. Creation of a journalists' privilege applicable solely at the Federal level raises no problem; Congress has plenary power over Federal investigative processes, subject only to limitations in the Bill of Rights. The serious question is whether Congress has constitutional power to enact a privilege which would protect journalists from State investigative processes.

The rationale for a legislative privilege applicable to the States would be to protect the flow of news to a national audience against constrictions resulting from State laws or State administrative actions. Two distinct sources of Federal legislative power are available to effectuate such a purpose. The interest in the free flow of news through interstate media of communications falls directly within Congress' powers to regulate, protect, and improve the channels of interstate commerce. The same interest in the free flow of news is also one which reflects the values of the First Amendment in full and unrestricted dissemination of news to the public. We believe Congress has authority under section 5 of the Fourteenth Amendment to enforce and protect the guarantees of the First Amendment against State interference.

1. The Congress possesses ample powers under the Commerce Clause to protect journalists from State governmental activities which would interfere with news gathering or dissemination. It is well established in legislative and judicial precedents that institutions engaged in the dissemination of information to the public are engaged in "commerce among the several States", and are accordingly subject to broad Congressional regulation and protection under Article I, section 7 and the Necessary and Proper Clause. Licensing of local radio and television stations under the Communications Act of 1934 is based on the constitutional premise that all persons engaged in public broadcasting are engaged in or affect interstate commerce.[1] As for print media, the Newspaper Preservation Act of 1970 exempts certain activities of local newspapers from Federal antitrust regulation, which is only applicable to activities in interstate commerce, in the "public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States."[2] Moreover, instances are numerous where general regulatory statutes applicable only to activities in or affecting interstate commerce, such as labor or antitrust laws, have been upheld as applied to newspapers, magazines, wire services, and broadcasters.[3]

In broader terms, if some activity affects interstate commerce as a generality, Federal legislative power extends to all particular instances of it, and regulation cannot be challenged because the commerce connection of the isolated instance is *de minimis* or even unproven. This rule surely applies to news dissemination as well as to loan-sharking or self-sufficient farming.[4]

The objection that the Commerce Clause should not be utilized except for economic objectives, narrowly conceived, has no constitutional force. Since the turn of the century, Congress has, with judicial approval, used its power to regulate interstate commerce to effectuate broad notions of morality, social justice and the public interest. The Civil Rights Act of 1964, outlawing racial discrimination in places of public accommodation, is probably the best known recent instance of this use of the commerce power.[5]

We believe there is no serious question but that the Commerce Clause authorizes Congress to create a newsmen's privilege effective against State as well as Federal interference.

2. The second source of Federal legislative power pertinent to this question is section 5 of the Fourteenth Amendment. The Supreme Court has held, in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), that Congress may displace State laws in order to guarantee Fourteenth Amendment rights in an instance where the Court would not itself invalidate the State law in question. While the Federal legislation involved in *Morgan* implemented equal protection rights, there is no basis, either in theory or in the language of section 5 defining Congress' power to enforce the Fourteenth Amendment, for denying Congress parallel power to enforce the Due Process Clause against the States. Since First Amendment freedoms have long been incorporated into the Due Process Clause, Congress presumably has power under *Morgan* to displace State laws which it finds to infringe freedom of speech or of the press, even if those State laws would not be struck down by the Supreme Court under the First Amendment.

How much of the *Morgan* rationale has survived the Court's decision in the 18-year-old vote case, *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), is uncertain. In that case, the Court refused to uphold Congressional authority to enfranchise 18- to 21-year-olds in contravention of State law, rejecting the theory that Congress was thereby "enforcing" the provisions of the Equal Protection Clause. However, that exercise of congressional power went far afield from the protection of "discrete and insular minorities" which is the central tradition of the Equal Protection Clause. Legislation to create a journalists' privilege, by contrast, surely lies near the heart of the values protected by the First Amendment. Factual doubts about the constrictive effect of press subpoenas on confidential sources led the Court to reject the claim of a constitutional newsmen's privilege. A different factual premise by Congress, resting on its different investigative and intuitive capabilities, should be respected by the Court as the basis for legislative acceptance of the privilege.

We believe, accordingly, that the enforcement power of the Fourteenth Amendment is, like the Commerce Clause, a suitable source of authority for Federal privilege legislation which displaces contrary State laws. Of course, any qualified Federal privilege applicable to the States need not, and should not, be fully preemptive in the strict sense of preventing the States from according *greater* protection if they wish to do so by more sweeping State laws.

B. *The Problems of Legislative Classification*

The second set of constitutional questions about Congress' power to legislate a journalists' privilege concerns whether any guarantees of the First and

Fifth Amendments impose impossible definitional requirements which would undermine the inevitable classifications which legislation would draw. In *Branzburg,* Mr. Justice White's opinion for the majority rejected the arguments for a privilege in part because of what he saw as potential difficulties of definition and application:

> "The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury" (408 U.S. at 703-05).

Despite Mr. Justice White's rather clear invitation for legislation, some have concluded from his catalogue of the difficulties of limiting a journalists' privilege that the Supreme Court might not be hospitable to legislation, which would necessarily have to draw some of these lines. See, *e.g.,* Norman E. Isaacs, *Beyond the Caldwell Decision,* Columbia Journalism Review, September, 1972, at 20. We believe such fears misunderstand the Court's rationale. Mr. Justice White was speaking of the difficulty of administering "a *constitutional* newsman's privilege," that is, one promulgated by the judiciary, under the constraints of principled adjudication. The problem which Mr. Justice White saw in the creation of a journalists' privilege is that which constitutional lawyers have termed the "under-inclusive classification": Will not others than those granted the privilege plausibly claim the appropriateness of being similarly treated? Such an argument is a powerful one when directed to the courts in the application of a constitutional mandate; equality or, as some have called it, "neutrality" of principle is surely essential to proper judicial action. But such a requirement of consistency is not imposed on the legislative process: ". . . a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U.S. 224, 227 (1914).

Judicial tolerance for a piecemeal legislative approach to a general problem is not restricted to old cases or to economic or social regulations not deemed to involve civil liberties. *Katzenbach* v. *Morgan, supra,* the leading modern decision dealing with Congress' power to legislate in aid of the individual liberties guaranteed by the Fourteenth Amendment, expressly approved an under-inclusive classification. The Court upheld legislation eliminating English literacy requirements for non-English-speaking citizens educated in American-flag schools where English was not the primary language, a statute which in practice enfranchised only persons educated in Puerto Rico. The statute was challenged because it did not grant relief to other citizens educated in Spanish-speaking schools which did not happen to fly the American flag. Even though the source of Congressional power to enact the provisions was the Equal Protection Clause of the Fourteenth Amendment, where one might expect to have found implicit the most stringent requirement of legislative consistency, the Supreme Court affirmed traditional principles of legislative flexibility:

> ". . . in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that . . .'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' " (384 U.S. at 657).

Congress is not completely free of constitutional restraints in deciding who should be given the benefit of a journalists' privilege. Congress could not legislate protection in a manner which discriminated among journalists or the media on the basis of content. Size of circulation or longevity of employment relationships with the media are examples of standards which should not be used in legislating a privilege because they would tend to exclude, for example, the "underground" press. On the other hand, we believe Congress may properly insist on such elements as a current employment relationship with some medium of communication characterized by periodic publication, or a past record of publication in periodic media. Congress is free to decide that among the large category of reporters, novelists, scholars, teachers, and pamphleteers who could plausibly assert some claim to the privilege, certain occupational groups have an especially pressing need if the flow of information to the public is to be protected in its most significant, or vulnerable, aspects. There may indeed be much practical justification for such an approach where legislation moves into an area for the first time:

> "The 'piecemeal' approach to a general problem, permitted by under-inclusive classifications, appears justified when it is considered that legislation dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what evasions might develop, what new evils might be generated in the attempt to treat the old. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so."

Tussman and tenBroek, "The Equal Protection of the Laws," *Selected Essays on Constitutional Law*, p. 795 (West, 1963).

Whether a piecemeal approach would represent the better part of legislative wisdom in this instance is another matter, which we deal with in the next section; we are concerned here only to dispel any doubts that a narrow statute would find difficult sledding in the courts. No constitutional barriers exist to limit Congress' reasonable discretion in drawing lines which would qualify the privilege by limiting it to those classes of persons whom Congress regards as most in need of legislative protection in the interest of full and unfettered dissemination of news to the public.

III. *GENERAL QUESTIONS OF LEGISLATIVE POLICY*

We believe the most important questions of policy presented by the proposals to create a journalists' privilege are as follows:

1) Is there a need for legislative protection; and, if so, should legislation be applicable only at the Federal level, or should it cover the States as well?

2) To what information should a privilege attach?

3) Should a privilege defer to certain special investigative needs?

4) Who should be able to claim the protection of a statutory privilege?

While these policy questions are substantially interrelated, and the conclusions reached as to any one will have an important bearing on analysis of the others, it will be helpful to consider them singly for purposes of analysis.

1. *The Need for Legislation and Its Appropriate Coverage*

The need for a statutory privilege is difficult to assess because the facts concerning journalists' reliance on confidential information and the adverse impact of actual or threatened subpoenas are to a large degree speculative. Precise empirical data on these matters will in the nature of things never be available; the more extreme protestations of journalists and prosecutors must both be taken with a grain of salt. In the end, the question of need must necessarily be resolved by the educated intuition of experienced legislators.

The only careful empirical investigation as yet undertaken suggests that promises of confidentiality are frequently utilized by many journalists. Professor Vincent Blasi of Michigan Law School surveyed 975 working journalists from all media with respect to a variety of questions about press subpoenas. The newsmen in the survey reported average reliance on confidential sources for about one-quarter to one-third of all stories, with heavier reliance on confidential sources among more experienced reporters. Blasi, *Press Subpoenas: An Empirical and Legal Analysis*, p. 22. Not surprisingly, stories about government operations involved the heaviest use of confidential sources, with something over one-third of the stories affected. *Id.* at 26.

The medium which made greatest use of confidential sources was newsweeklies, affecting between one-third and one-half of the stories.

As for the adverse impact of actual or threatened subpoenas, Professor Blasi found that about 8% of his respondents reported that their coverage of a particular story within the past 18 months had been adversely affected by the possibility of being subpoenaed. His findings, however, do suggest that the recent surge of press subpoenas "has generated among newsmen a great deal of resentment, recrimination, and suspicion toward the Government. It has also generated widespread fears among reporters that their sources will 'dry up.'" *Id.* at 41. Blasi's findings on this point, it should be emphasized, were collected prior to the Supreme Court's decision. Blasi found journalists virtually unanimous that nothing would have a more detrimental impact on source relationships than an adverse decision in the Caldwell case. The Supreme Court's decision has doubtless increased the difficulty of acquiring confidential information, as a result of the attendant publicity and imprimatur of the Court, and reporters would now presumably be even more negative about the impact of subpoenas.

While journalistic and social trends may have bolstered the case in favor of a statutory journalists' privilege, it is equally the case that general trends in the law of evidence are moving against recognition of such a privilege. In this modern tendency, evidence law may be thought to reflect the restrictive views of Professor Wigmore towards all privileges:

> "There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." Wigmore, 8 *Evidence* §2192.3.

In this spirit, the proposed Federal Rules of Evidence restrict existing privileges and make no provision for a journalists' privileges. See Rules 501 *et seq.*

In light of this overall tendency away from privilege in the law of evidence, it is not surprising that the Supreme Court rejected a journalists' privilege resting on constitutional interpretation and judicial rule-making. As McCormick put it twenty years ago, "The development of judge-made privileges halted a century ago. The manifest destiny of evidence law is a progressive lowering of the barriers to truth." McCormick, *Evidence* §85. Since evidence law is increasingly unsympathetic to privileges, and even the traditional attorney-client and inter-spousal privileges are regarded as dubious exceptions, we believe Congress should look directly to the specific policy questions raised by a journalists' privilege, and not attempt to reason by analogy to traditional evidentiary privileges. Even if analogies could be drawn, their force as justifications would still be questioned by the many judges and practitioners who view the traditional privileges with skepticism.

The considerations Congress should weigh are the adverse impact of the present subpoena threat upon the flow of useful information to the public, as compared with the impediments to official investigations which different statutory privileges would create. If Congress concludes that one of these interests, as a general matter, very substantially outweighs the other, then its response should be either to legislative sweeping privilege or to provide no statutory protection whatever. If, on the other hand, Congress should conclude that both interests are substantial and worthy of recognition, it should attempt by statute to reconcile the two interests in some fashion, by protecting each interest when it is most compelling, while allowing it to be overcome when it is relatively less in jeopardy. Failure to enact any statute is to leave the official investigative interest dominant as a matter of law in all circumstances; the public interest in maximum dissemination of news is left to the discretion of prosecuting and other investigative officials.

While we respect the need for broad official investigative powers, we believe the existing complete absence of any journalists' privilege unduly subordinates the First Amendment values in giving the public access to information which, as a practical matter, may not be forthcoming without some protection from compelled disclosure. It should be remembered also that an accepted canon of journalists' ethics is nondisclosure of confidential sources. Several reporters have already demonstrated their willingness to go to jail rather than bow to official demands for confidential information. The futility of the contempt power, in circumstances where wide public sympathy may lie with the recalcitrant reporter, is not in our opinion a helpful symbol of the legitimacy of investigative processes. We thus support a legislative journalists' privilege in some circumstances. At the same time, we do not believe an absolute privilege is called for, since there are compelling instances in which official truth-seeking processes should have primacy even at the expense of inhibiting the public's "right to know."

Assuming the need for some statutory protection, the first major question of policy for Congress is whether both the Federal Government and the States should be bound by whatever privilege is enacted. Recent events suggest that the primary need for a journalists' privilege exists at the State level, although a statute would serve some important objectives at the Federal level as well.

In August 1970, in response to strong press reaction to numerous Justice Department subpoenas to journalists such as Earl Caldwell, the Attorney General issued guidelines designed to reconcile the legitimate interests of the press and of Federal law enforcement. These guidelines provide that no subpoena will issue without prior negotiation with the affected member of the press, and if negotiation fails, then only with the express authorization of the Attorney General. The standards for the Attorney General's approval require: (1) There is sufficient evidence of a crime from non-press sources ("the Department does not approve of utilizing the press as a springboard for investigations"); (2) the information sought must be "essential to a successful investigation"; (3) the Government must have unsuccessfully attempted to get the information from alternative non-press sources; (4) subpoenas should generally issue only to verify published information, and "great caution" should be exercised with respect to subpoenas for unpublished information or where confidentiality is alleged; (5) even subpoenas for published information should be "treated with care" because newsmen have encountered harassment on the grounds that information collected will be available to the Government; and (6) subpoenas should be directed to specific information.

As of last fall, in the two years the guidelines had been in effect only seven subpoenas had been approved by the Attorney General. In Congressional hearings last fall none of the spokesmen for privilege legislation could point to a single instance of subpoena abuse by the Justice Department since the guidelines. See Hearings before Subcommittee No. 3 of the House Judiciary Committee. At those hearings, the Justice Department opposed the passage of any qualified privilege as unnecessary in view of the guidelines. See *id.*, Statement of Assistant Attorney General Roger Cramton, p. 21. We are not aware of any developments since that time which would indicate that the impact of the guidelines has changed.

There are, nonetheless, two valuable purposes at the Federal level which could be accomplished by legislation. First, the Attorney General's guidelines do not limit the issuance of subpoenas in connection with administrative or legislative investigations, or in private lawsuits. The "Selling of the Pentagon" controversy suggests the dangers of unnecessary subpoenas issuing from Congressional committees, and administrative subpoenas are more numerous and potentially more damaging to journalists. Moreover, the Attorney General's guidelines, while a praiseworthy restriction of prosecutorial power, are subject to change at any time. And even if the guidelines remain in force, they lodge ultimate discretion in the Attorney General rather than providing, as a qualified statutory privilege would, for disinterested judicial review. The guidelines are necessarily flexible, and their administration could vary greatly depending on the sympathies of different Attorneys General. In sum, a statutory privilege at the Federal level would add both scope and security to the protection of journalists from compulsory disclosures.

It is at the State level that recent events suggest the greatest need lies. All but one of the recent publicized cases of actual or threatened incarceration of newsmen have been for refusing to disclose confidential information in the face of State investigative demands. While some twenty States now have some form of statutory privilege on the books, journalists in most States are without any protection. Moreover, even in States which have passed "shield" laws, judges have proved zealously adept at finding loopholes which allow reporters to be held in contempt despite apparent statutory protection. William Farr's incarceration, for example, rested on the curious theory that because he was not currently employed as a journalist when asked to identify his confidential source, he was not covered by the State shield law even though he was a regular journalist when he got the story.

The disruptive effect of State compulsions to testify is not limited to journalistic investigations and reporting only about matters of local interest. The communications media are of course nation-wide. Even the most local news organs are reviewed by interstate media for information of general interest. Full disclosure of newsworthy matters of national significance may well depend on confidential information gathering which could be hampered by State subpoenas. This is typically the case with respect to reporting about dissident groups or even certain kinds of local government misbehavior which may violate some Federal statute or administrative regulation, or otherwise be of national interest. Given the wide sweep of basic State criminal jurisdiction, much confidential information about matters of national import may not be passed to journalists because of fears about State investigative processes.

Thus, we conclude that an important need for a journalists' privilege exists at the State level, and that the basic Federal interest in full dissemination of information of national significance justifies a Federal statute which limits State as well as Federal subpoena powers. We recognize the value of local responsibility for law enforcement, but we believe the national interest in this situation justifies a statute of national applicability. The most significant State investigative interests can be taken into account in the qualifications which, in our view, should limit the force of any statutory privilege.

2. *What Information Should Be Privileged?*

We believe that protection of reporters' confidential source relationships should be the key element in defining what information comes within a statutory newsmen's privilege. Protection of the identity of sources will contribute—in some cases, at least, will be essential—to the willingness of sources to give information to the press, and the securing of newsworthy information that would otherwise be unavailable lies at the heart of the public interest in full news dissemination which justifies subordination of governmental investigative requirements.

On the other hand, an absolute protection for journalists from testimonial obligations seems to us not warranted. Reporters should of course be available to testify about all non-journalistic activities. As for information collected in the course of journalistic activities, we believe no privilege should attach except for information received under a promise of confidentiality, and even then the privilege should not apply to information which has been published.

Where a journalist is an active participant in criminal activity, in the sense of aiding and abetting as opposed to mere observance, or where he engages in private activities relevant to civil litigation, we believe no serious case can be made for a privilege. A harder case is where a journalist witnesses events in public in the course of journalistic investigations, such as the reporter assigned to observe a violent demonstration. Subjecting the newsman to compulsory disclosure in such a case may inhibit his capacity to cover similar events in the future, as is attested by recent incidents where newsworthy lawbreakers smashed cameras or otherwise prevented newsmen from recording information for fear that the records would be turned over to law enforcement authorities. Notwithstanding this kind of harassment, which has some adverse effect on newsgathering capacity, we believe no privilege should attach to information witnessed in public, where no element of confidentiality is present. The investigative value of reporters' eye-witness testimony will generally be high. And while reporters' capacity to cover public events can be subject to harassment, such actions, in the nature of things, will rarely cause coverage to be completely suppressed.

Hopefully, law enforcement officials will recognize that calling reporters even for eyewitness testimony as to public events can result in reprisals and, in the pattern of the Attorney General's guidelines, not compel this sort of testimony except for good cause. No statutory protection, however, seems warranted to us. The obligation to testify about public events, however, should not trench on confidential relationships, and therefore should not apply to situations from which the reporter could have been excluded:

> "... a newsman would have to testify as to his observations of demonstrations on city streets, but would not be required to disclose information relating to a meeting of a dissident group which could have excluded him from the meeting and which admitted him only because he promised to keep the proceedings off-the-record." Note, *Reporters and Their Sources,* 80 Yale L.J. 317, 368 (1970).

We believe no privilege should attach to confidential information which is published or broadcast, and reporters should be subject to compulsory process for the purpose of verifying under oath the accuracy of published material in a situation where the accuracy of the story is properly in issue. The publication exception must be precise, however; reporters should not be required to testify as to any confidential information not actually published, such as the identity of an anonymous source of published information. Nor do we intend to suggest that it would be proper to institute criminal or investigative proceedings directed against the press, to establish the truth or falsity of published material.

Thus, the three general categories of information to which no privilege should attach, in our view, are a reporter's non-professional activities, facts observed in the coverage of public events, and information actually published whether received in confidence or not.

The essence of a statutory privilege should be protection of confidential source relationships, and we believe all confidential information should be treated as equally worthy of protection. The main distinction sometimes made here is between the identity of confidential sources and the information which they impart. Professor Blasi found that more than 90% of the reporters surveyed believed protection of identity was more important than protection of contents. Blasi, *supra* at 63. However, virtually all the reporters felt that both categories of confidential knowledge should be privileged if investigative reporting was not to be disrupted. While the identity of sources may be the most sensitive confidence in the hands of a reporter, the contents of confidential information could often provide investigative leads to the source. Thus, we urge inclusion of the contents of confidential communications within a statutory privilege.[6]

3. *Scope of the Privilege*

With respect to a privilege aimed at protecting confidential relationships, the question arises whether qualifications are appropriate in exceptional circumstances. Many of the privilege bills introduced in the last session contained exceptions for investigations of great public importance. For example, S.3932 (of the 92d Congress) qualified the privilege if an official "demonstrated a compelling and overriding national interest in the information." Other proposals were more specific. S.1311, for example, lifted the privilege if a court determined "that there is substantial evidence that disclosure of the information is required to prevent a threat to human life, espionage, or foreign aggression." In addition, some bills would lift the privilege as to allegedly defamatory information received in confidence, where the defendant in a civil action for defamation asserts a defense based on the source of such information.

We support carefully defined exceptions to a journalists' privilege to deal with situations of special investigative urgency, so long as the information sought by the investigator is not available from alternative sources. Under no circumstances should a reporter be compelled to breach a confidence where the investigative need could be satisfied by evidence from a different source.

A general subjective exception, in the manner of S.3932, however, seems to us unsatisfactory in imposing on the courts an obligation to decide an amorphous question without guidelines. When a similar argument was made in the *Branzburg* case that such a judicial responsibility was implicit in the First Amendment, Mr. Justice White responded for the Court:

> ". . . by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make,

> since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution" (408 U.S. at 705-706).

What specific statutory exceptions to the privilege are justified? As for civil litigation, libel suits present a justifiable occasion for lifting a statutory privilege where a defendant relies on a confidential source as the basis for his defense. Under *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny, a plaintiff in virtually every libel suit against the press must prove knowledge of falsity or "reckless disregard of the truth." Moreover, the proof of reckless disregard has been held to require a showing "that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968). Given these stringent requirements, Professor Blasi is no doubt correct in concluding that recognition of a journalists' privilege in libel suits would make recovery under the reckless disregard standard virtually impossible. Blasi, *supra* at 229. We do not believe that privilege legislation should further insulate the press from civil liability for reckless or malicious libel.

Other than defamation actions, civil litigation does not present appropriate occasions for exceptions to a journalists' privilege. Indeed, the Second Circuit Court of Appeals has upheld on First Amendment grounds a reporter's refusal to divulge a confidential source at the behest of a civil rights class action plaintiff. The court regarded the *Branzburg* decision as limited to grand jury subpoenas, and concluded that civil judicial proceedings did not present a similar "rare overriding and compelling interest" which should overcome the First Amendment value of protecting confidentiality. *Baker* v. *F. & F. Investment,* Docket No. 72-1413 (decided December 7, 1972). We agree with the Second Circuit that civil litigation generally does not present a justifiable basis for overriding a journalists' privilege. Except for the generic exception of libel actions, the occasional specific exceptions do not seem to us worth the trouble of requiring courts to litigate civil case press subpoenas on a case-by-case basis, under a general standard.

As for criminal investigations, we agree in general with the exceptions of S.1311 of the last Congress. Prevention of foreign aggression and espionage seem to us obvious overriding concerns, at least if the legislation makes clear that the latter is limited to the usual conception of clandestine transmission of information to foreign agents and not public dissemination through the publication of government secrets. Prevention of a threat to human life in the future also seems to us a compelling basis for overriding the First Amendment interest in protection of confidentiality, except that we would require the threat be directed to specific lives (though not necessarily identified by name), to prevent the privilege from being overridden whenever an investigation can point to apocalyptic rhetoric of dissident groups.

We believe also that the privilege should be overcome in the interest of solving past crimes of a particularly serious nature. Investigation of murder seems an appropriate exception to a statutory privilege. We suggest that Congress consider whether other crimes involving egregious risks of death, such as arson of an occupied building, skyjacking, or kidnapping might be appropriate exceptions to a statutory privilege even when no death has resulted. Additional crimes of extreme seriousness can be added to the excepted list, but obviously the value of the privilege in First Amendment terms will be diminished if the list is unduly enlarged. Each situation considered for an exception should present a strong social justification for complete official investigation, while at the same time being sufficiently definite to avoid the creation of loopholes which would erode the privilege.

In the area of crimes of governmental corruption or malfeasance, on the other hand, where journalism based on confidential sources has frequently served as the most effective means of exposure, we believe the privilege too important to the public interest for the creation of any exceptions in favor of official investigations.

The appropriate scope of a journalists' privilege at the trial stage of criminal proceedings poses problems of exceeding difficulty. The right of a criminal defendant to compulsory process for obtaining witnesses in his favor is of constitutional dimension under the Sixth Amendment, reflecting the paramount value we attach to protecting innocent persons from conviction.[7] While the interest of the prosecutor in fullest access to testimony at criminal trials is not of constitutional dimension, it is nonetheless of the highest social importance. In proving guilt beyond a reasonable doubt, the prosecutor may, in unusual but conceivable circumstances, have need to negate exculpatory hypotheses by evidence not obtainable except by breaching a journalists' privilege. In such a situation, the prosecutor's interest in overcoming the privilege at trial would be more compelling than his interest in calling the newsman before the grand jury in similar circumstances, in light of the much stricter burden of proof on the prosecutor at trial. Thus, we believe that compulsory process at criminal trials, whether in behalf of the prosecution or the defense, should overcome the journalists' privilege, so long as the instigating party can satisfy the condition, which should apply to all exceptions to the privilege, that there is no available alternative source for the same evidence. Appropriate procedures to be followed in judging whether this condition is met, and whether the testimony at issue is privileged in the first instance, which may or may not require *in camera* determinations by the trial judge, would parallel those suggested in such opinions as *United States* v. *Reynolds*, 345 U.S. 1, 8-11 (1953); *Environmental Protection Agency* v. *Mink*, 41 Law Week 4201, 4207 (Jan. 22, 1973).

4. *To Whom Should the Privilege Extend?*

One of the most troubling questions concerning a journalists' privilege for confidential source relationships is who should be able to claim its protection. The Supreme Court, as we have seen, regarded this issue as posing serious constitutional problems for a judicial privilege grounded in the First Amendment. As we have tried earlier to make clear, Congress is not similarly hedged in by constitutional difficulties in determining to whom a statutory privilege should extend. Legislatures are free to draw lines in statutes in order to meet social problems at their most serious or expedient points. The basic question of legislative policy nonetheless remains.

We believe the initial legislation should enter this sensitive area cautiously, leaving open the possibility of broadening the reach of the privilege at a later date in the light of further experience.

Obviously, the statutory privilege should cover anyone regularly employed in a newsgathering or disseminating capacity by any newspaper, wire service, periodical, broadcasting station or network. Free-lance professional journalists should also be covered, provided their professional status is established by a showing of prior publication or broadcast of their materials in one of the covered media. We believe Congress should go farther than a regular employment relation or prior experience, and protect anyone clearly associated with an established medium of communication in connection with the journalistic story for which he claims the privilege. This would include free-lancers who, though not having the professional experience referred to above, could demonstrate some tangible connection with a medium of news dissemination. Potential journalists working without a contract on their first stories would not be covered, but this gap in the protection of some confidential sources seems well worth the administrative convenience and protection of official investigatory powers inherent in having some definite limits on the reach of the privilege.

A vexing problem is what should be considered a medium of news dissemination, for purposes of establishing an employment relation or other connection. Professor Blasi suggests that one requirement for such a medium be some element of periodicity—"continuing publication [including broadcasting] at more-or-less regular intervals." Blasi, *supra* at 268. This would prevent witnesses from altering their immediate behavior to achieve statutory protection. Such a requirement might exclude the upstart publication, but again the cost seems worth the gain of providing relatively clear limits on the reach of the privilege.

Extending the statute to cover all free-lancers, authors, scholars, lecturers, pamphleteers, etc. not only would complicate its administration but would involve Congress in making findings on First Amendment claims that are less clear, and perhaps different in nature, than those involving professional journalists and the press media.

February 1, 1973.

Respectfully submitted,
COMMITTEE ON FEDERAL LEGISLATION
MARTIN F. RICHMAN, *Chairman*

MARK H. ALCOTT
MICHAEL F. ARMSTRONG
STEPHEN E. BANNER
BORIS S. BERKOVITCH
DONALD J. COHN
ELIZABETH B. DUBOIS

PETER F. FLEMING, Jr.
RICHARD A. GIVENS
DAN L. GOLDWASSER
MURRAY A. GORDON[*]
GEORGE J. GRUMBACH, Jr.
ARTHUR M. HANDLER
ELIZABETH HEAD
CHARLES KNAPP
ARTHUR H. KROLL
WILLIAM B. LAWLESS

STANDISH F. MEDINA, Jr.
ROBERT G. MORVILLO[*]
EUGENE H. NICKERSON
WILLIAM B. PENNELL
BRUCE RABB
BENNO C. SCHMIDT, Jr.
THOMAS J. SCHWARZ
BEATRICE SHAINSWIT (Hon.)
BRENDA SOLOFF

---

[*] Individual views of Mr. Gordon are set forth following the footnotes. Mr. Morvillo dissents, believing that a factual basis for a journalists' privilege has not demonstrated the need for legislation at this time.

FOOTNOTES

[1] 47 U.S.C. §301.

[2] 15 U.S.C. §1801.

[3] See, e.g., *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951).

[4] *Perez* v. *United States*, 402 U.S. 146 (1971); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[5] 42 U.S.C. 2000a; see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964).

[6] In addition to protection of confidential source relationships, a separate and difficult question is whether, in general, reporters should be protected from subpoenas *duces tecum* to produce notes, tapes, films, photographs, first drafts, etc., covering information as to which no testimonial privilege would lie. Here the issues do not relate to the protection of sources, and consequent enhancement of availability of information to the public, but rather to the journalist's own interest, and that of his medium, in being able to make editorial decisions free of governmental scrutiny or second-guessing. Likewise, the issues on the prosecutor's side relate not to undisclosed information so much as to the probative force of tangible evidence as against testimony by the reporter. While the issues are serious, and in some aspects may involve the very fundamental First Amendment value of editorial freedom, we believe this subject should be separated for legislative consideration from the question of a privilege based on confidential source relationships.

[7] The recently-revised Rule 17 of the Federal Rules of Criminal Procedure authorizes compulsory process to secure witnesses in his behalf if the defendant can, in the words of Professor Wright, show that his request "is not frivolous." 1 Wright, *Federal Practice and Procedure, Criminal*, §272 at 540 (1969).

INDIVIDUAL VIEWS OF MURRAY A. GORDON

I am in agreement with the major components of the Committee's report, but I feel constrained to note two items of disagreement:

1. I do not believe that any exceptions to the reporter's privilege should be allowed on the basis of the nature of the subject matter of an official investigation. The exceptions proposed by the report are based upon the assumption that the necessities of law enforcement in the instance of certain serious crimes should override the First Amendment considerations which underlie the privilege. I believe

that the privilege furthers rather than conflicts with law enforcement objectives. The reporter's privilege facilitates access to information, and this would include information concerning threatened or past crimes which would presumably be otherwise unavailable; indeed, the lack of other available information is the condition which the Committee report imposes upon the disallowance of the privilege. In this view, the privilege, by facilitating the publication of otherwise unavailable information concerning threatened or past crimes serves to provide persons threatened, law enforcement officials, and the public with warning as to threatened crimes and leads as to past crimes which would otherwise not come to their attention. The net effect, in the described circumstances, is the furtherance of rather than interference with law enforcement objectives.

2. Similarly, I am obliged to disagree with the Committee's recommendation substantially to eliminate the newsmen's privilege at the trial stage of criminal proceedings. I am not persuaded that the public interest in every prosecution is greater than the public interest in every fact finding process inherent in legislative or grand jury investigations. If there is an overriding public interest or constitutional imperative in sustaining the newsmen's privilege in the latter case, then that interest is equally compelling in a criminal prosecution. The suggestion in the report that the privilege be allowed in a criminal prosecution where the prosecutor cannot demonstrate the lack of other available alternative sources for the evidence to be adduced is not an effective safeguard since it is difficult to conceive of a defendant who will undertake to demonstrate the existence of such other evidence, nor can the witness reasonably be expected to do so, and the prosecutor obviously will decline to present such other proof. The effective consequence of the Committee's recommendation in this respect is to authorize the disallowance of the privilege wherever a prosecutor deems fit to question a reporter.

MURRAY A. GORDON

POLL OF STATE ATTORNEY GENERALS, MARCH 27, 1973

Replies received from Attorneys General of States of:

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
Georgia
Hawaii
Idaho
Illinois
Kansas
Kentucky
Louisiana
Maine
Maryland
Michigan
Minnesota
Missouri
Montana
New Hampshire
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Rhode Island
Tennessee
Texas
Vermont
Virginia
Washington
West Virginia
Wyoming

MEMORANDUM FOR ARTHUR B. HANSON

Re: Responses of State Attorneys General To Inquiry Re Confrontations Between Press and State Governmental Investigative Bodies

I have reviewed the 34 responses to your letter dated January 24, 1973 to the State Attorneys General regarding confrontations between the press and investigative bodies in their states, and their views upon the ANPA newsman's privilege proposed bill. I have classified the responses into the following categories:

1. Not aware of any incidences concerning problems which may have arisen between the press and the various state governmental investigative bodies of their state:

Arkansas
Colorado
Georgia
Hawaii
Idaho
Illinois
Kansas
Louisiana
Michigan
Minnesota
Missouri
Montana
New York
North Carolina (letter referred to legal counsel for N.C. Newspaper Publishers Association.)
North Dakota
Vermont
Virginia
Washington
West Virginia

2. Reference to state court cases in their state:

(a) *Alabama: Ex parte Sparrow*, 14 F.R.D. 351 N.D. Ala. (1953). Motion by plaintiff, whose civil action for libel had been instituted in the United States District Court for the Southern District of New York, to compel newspaperman whose deposition was being taken, at the instance of plaintiff, in Birmingham, Alabama, to disclose the sources of information which he had supplied to defendant-publisher of the alleged libelous matter. The District Court, Lynne, J., held that the newspaperman who had invoked Alabama statute granting privilege against disclosure of sources of information published in a newspaper, would not be compelled to disclose his sources of information. Motion denied.

(b) *California: William Farr* case.

(c) *Kentucky: Branzbury v. Hays*, 33 L.Ed 2d 626 (1972).

(d) *Maryland: Lightman v. Stat*, 294 A. 2d 149 (Md. Sp. App.) aff'd. per curiam No. 233 (Md. App. Oct. 7, 1972) (Petition for Writ of Certorari filed). A shopkeeper of a pipe store gave on-the-scene information to a reporter which revealed her complicity in illegal marijuana activities and the court held that her identity was not protected by the Maryland Newsmen's Privilege Statute.

(e) *Oregon: State v. Buchanan*, 256 Or. 244, 436 P. 2d 729 (1968) cert. den. 392 U.S. 905. Supreme Court of Oregon held that freedom of the press did not give a newspaper reporter the constitutional right to preserve the anonymity of an informer before a county grand jury investigating the use of marijuana. The decision was based upon the rationale that a court could not constitutionally grant a special privilege to "newsgathers" without defining the membership of that class and that by so doing, freedom of the press might be infringed as to those persons not included within the class. However, the court declined to decide whether the Constitution forbids the *legislative enactment* of reasonable privileges to withhold evidence.

(f) *Tennessee:* Within the last two or three months, a news reporter, Harry Thornton of WDEF-TV in Chattanooga, who had conducted a talk show, was cited for contempt and jailed for several hours for refusing to disclose the identity of a grand juror who accused the grand jury of conducting a whitewash as to their investigation of a local judge. The matter was not pursued at the appellate level because it become moot.

(g) *Texas:* Two instances of attempts to block the free flow of information were reported last year.

1. An editor and his reporter were ordered by an Arkansas judge (Arkansas is across the street from the town where the newspaper is located) not to publish the story that the first of two men being tried in a rape case had been found guilty. The editor printed the story and the judge found them guilty of contempt of court and gave them a 60-day jail sentence and a $250.00 fine—suspended. On appeal, the Arkansas State Supreme Court overruled the judge's contempt order.

2. In Corpus Christi last year, an attorney for a person found guilty of killing a police officer filed a motion for a new trial and asked for the negatives of photographs which the *Corpus Christi Caller-Times'* photographer had taken around and outside of the court. The trial judge supported the request (although he later said he wished that he had not), but the newspaper refused to provide the negatives. The newspaper ceased to resist the subpoena.

3. Responses favoring newsmen's privilege legislation:

(a) *Connecticut:* Attorney General Killian is in favor of the right of a newsman to protect his sources because he feels that the news media is the "most effective shield ever devised for protection of the people's right to know". He is in favor of protecting a confidential communication made to a newsman in his professional capacity because "they very process of public information will stop if confidentiality can be destroyed by any government official's whim". He is, therefor, supporting the enactment of a shield law in Connecticut which would provide that no professional newsman will be subject to contempt for refusing to identify his news sources. (See remarks of Attorney General Robert K. Killian for the New Haven County Junior Bar Association Graduate's Club, January 15, 1973, and statement before Judiciary Committee of Connecticut State Legislature on January 31, 1973.)

(b) *Maine:* Not aware of any problems in the State of Maine. Occasional minor disagreement concerning the release of information in connection with the investigation of homicide and similar cases, but these are usually resolved without difficulty. The ANPA bill is almost identical to a bill submitted to the current session of the Maine Legislature. Attorney General Jon A. Lund supports this bill and "may endorse it publicly".

(c) *New Mexico:* No incidences involving confrontations between press and government in New Mexico. However, a law similar to the ANPA proposal is now before the New Mexico Legislature. Attorney General David L. Norvell has given his full and active support of this unqualified newsmen's privilege legislation for his state.

(d) *New Hampshire:* Attorney General Warren B. Rudman support House Bill 277 pending in the New Hampshire House of Representatives, which bill is very similar to the ANPA proposal in that it protects both the source of news gathered for public dissemination and any unpublished information obtained in the course of gathering news which has been published.

4. Qualified support for enactment of newsmen's privilege legislation:

(a) *Delaware:* The Attorney General has subpoenaed a local major Wilmington newspaper to produce for investigative purposes only, and not for evidentiary purposes, a photograph taken by a newspaper photographer at a demonstration. The photograph was not printed in a newspaper, although a picture taken by the same photographer was printed. The newspaper has resisted the subpoena and the matter is now before the Delaware Supreme Court.

The Attorney General believes that newsmen's privilege legislation should be approached with caution. There is concern that such legislation might encourage less scrupulous people in the news media to be irresponsible regarding publication of defamatory statements with regard to public figures who would be without recourse. On the other hand, there is recognition of the need to protect confidential sources and that the news media and the confidential sources should not be arms of law enforcement. There is recognition of the harmful effects of the arbitrary subpoenaing of newsmen for grand juries or other hearings in order to harass or force exposure of confidential sources of information. But the Attorney General is concerned that this situation might give rise to legislation which would go too far in protecting newsmen. The Attorney General feels that there are many instances where society has a greater interest to which the news media should respond rather than to hide behind a statutory privilege.

(Response prepared by Jerome O'Herlihy, Chief Deputy Attorney General with copy to the Honorable Robert W. Kastenmeier and the Honorable Sam J. Ervin, Jr.)

(b) ***Rhode Island***: There have been infrequent instances in the past few years regarding confrontations between the press and law enforcement. This is in part due to the Rhode Island Newsmen's Privilege Act. Attorney General Richard A. Israel indicates that even prior to the Rhode Island Statute, Rhode Island law enforcement authorities were aware that the sources of most newsmen's information, as opposed to direct evidence testimony, were usually obtainable in other ways than through the grand juries or other formal investigative proceedings.

The Attorney General is not in favor of those provisions in the ANPA bill which he feels would allow a person claiming to be the potential author of a manuscript of a book which has not yet been written to claim the privilege against testifying to a murder to which he was an eyewitness. The Attorney General is in favor of a requirement of regularity of publication for the protected media and the regularity of the employment of the protected witness, as well as the specific exclusion from the privilege of eyewitness testimony to acts of criminal violence.

(c) *Wyoming:* A bill is now pending before the Wyoming State Legislature which, if passed, will provide that no person engaged in media work shall be compelled or required to disclose the identity or source of an informant or any notes or other material obtained in the course of such employment, in any legal proceeding, including a trial investigation, grand jury or petit jury.

While Attorney General Clarence A. Brimmer generally is favorable toward such legislation, he is somewhat disturbed by the complete lack of qualification of such privilege, since it has occurred to him that there could be instances where information pertaining to the commission or concealment of crime ought to be disclosed to a grand jury.

5. Miscellaneous.

(a) *Ohio:* Attorney General William J. Brown has had "only the usual occurrences which one learns to expect if he is a public official." He feels that while the inherent trust which we place in our news media is occasionally violated, overall, it is upheld.

JOHN N. FENRICH, Jr.

STATE NEWSMEN'S PRIVILEGE LEGISLATION AND CASES ARISING THEREUNDER

(By Arthur B. Hanson, General Counsel, American Newspaper Publishers Association)

PREFACE

This memorandum on state privilege legislation assumes some familiarity on the part of the reader with the discussion of the proposed federal legislation and the problems raised thereunder in our August 31st memorandum.

The focus of the state legislation on newsman's privilege is different in certain key areas from the focus of the federal proposals. At first glance, the state statutes appear to grant a broader protection to newsmen than the federal proposals do, since unlike the federal bills, the vast majority of the state statutes do not have any qualifications on the privilege granted. These state statutes, however, are not as protective as the federal bills. Sixteen of the eighteen state statutes protect the newsman only from the disclosure of a "source" of information, whereas all of the federal bills protect the newsman from the disclosure of the *information* as well.

Along with the August 31st memorandum, this analysis is meant to be a charter with which to begin to explore the complex area of newsman's privilege legislation.

All of the state statutes are set forth in an appendix to this memorandum; and therefore, the references to the statutes in the memorandum have not been accompanied by the citations to the state code.

I. PERSONS PROTECTED

The persons protected by the state statutes are, in most instances, a more limited group than those protected by the federal bills and proposals. The group is narrowed by the use of three techniques—the definitions of the relationship between the person protected and the various media, the listing of the various media themselves and, finally, the insistance in both the definitions and the lists that the relationships be "regular" or that the media be "legitimate."

In one aspect, however, the persons protected in the state statutes possibly comprise a larger group than those protected in the federal bills. For only the state statutes specifically protect persons who have been newsmen but are no longer, as well as persons who have been and continue to be newsmen.

A. Description of relationship between the persons protected and the news media.

Although very few of the state statutes use exactly the same words to define the relationship between the persons protected and the news media, the definitions found in all the statutes can be broken down into three basic groups.

The three groups of definitions are found in:

(1) Statutes using nouns ("reporter").

(2) Statutes describing the contractual relationship between the protected person and the news media ("employed by").

(3) Statutes describing the functions performed by the protected person within the news media ("gathering news").

Some statutes use more than one of these devices in order to limit the protection of the privilege; others use yet another device—they describe the information whose source the protected person need not reveal.

1. Statutes using nouns

Four statutes [Ark., Ind., Mich., Nev.] use nouns to describe the relationship between the persons protected and the media. (These statutes are to be distinguished from statutes which protect a "reporter" or a "professional journalist", but then go on to define those terms.) In the four statutes which use nouns, but do not go on to define those nouns, the main problem in determining the scope of their protection is, of course, this lack of a definition. Most frequently, the nouns used are:

(1) reporter or reportorial employee;

(2) editor or editorial employee.

Confronted with these statutes, a court would be likely to limit their protection to salaried employees of the various media; independently contracted workers would probably not be protected.

This use of nouns has another limiting effect on the legislation's coverage. All the federal bills seem to take pains to ensure that, if news is protected at all, it is protected completely. They do this by granting the privilege to anyone connected with the news media—whether that person collects, edits or disseminates the news.

Most of the state statutes take similar precautions. However, a few, particularly those which define the relationship of persons protected to the news media by using nouns, do not. The Arkansas statute, for example, protects an "editor, reporter or other writer for a newspaper", but only the "manager or owner" of a radio station. The Michigan statute[1] protects only "reporters".

In viewing the state statutes which do protect only a limited group of persons who will come into contract with the information, it should be remembered that most of those statutes, unlike the Federal proposals, extend the privilege only to the source of information. While a large number of editorial assistants could probably testify regarding information, probably no one but the reporter could testify regarding the source of that information. Therefore, an extensive coverage of "everyone in the office" is not as necessary in the state as in the federal legislation.

---

[1] The Michigan statute is certainly the briefest of the state statutes:

"In any inquiry authorized by [the Code of Criminal Procedure], communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential."

2. Statutes describing the contractual relationship between the protected person and the news media

The California statute forms a bridge between the last group of state laws and this next group. It protects "a publisher, editor, reporter or *other person connected with or employed by* [a news media]". The next group of statutes [Pa., Alabama, Ken., Mo., N.J., Mont., Ohio] protects "persons engaged in connected with or employed by [news media]."

These contractual terms which describe the relationship between the persons protected and the news media seem to encompass within the scope of persons protected by the state statutes every janitor and window washer in a newspaper building. To put a brake on the scope of their protection, the California statute and the statutes of most of these states limit the information whose sources they protect to that information which has been published. Any person connected with the news media is protected from disclosing his sources only so long as the information garnered from those sources is published. These statutes would protect free-lance news gatherers—but only so long as their information was eventually published in a recognized media. That condition would leave many news gatherers—independent or not—vulnerable to subpoenas.

Not wishing to limit its protection to the sources of only published information, several laws in this second group have no such requirement, but list instead the functions in which a person must be engaged in order to gain access to the statute's protection. This list varies depending on the media protected by the statute, but, generally it includes the functions of "gathering, procuring, compiling, editing and publishing news." [Pa.]

Two of the statutes [Mont., Ohio] are broader than the others. Like Pennsylvania, they protect persons who have not yet published information. In addition, they make clear that the relationship between the media and the news gatherer can be tenuous; they describe their persons protected as persons "engaged in *the work* of a news media" instead of just persons "engaged on a news media." The question could arise whether "engaged in the work of [a news media]" meant in the exact work and assignments handed down by the listed news media or in the same general field of work as the listed news media; this ambiguity is further muddled by the way in which the source of the information protected is described: "Source of the information gathered in the course of his employment." Does this phrase include within the statute's protection a self-employed news gatherer? The statute needs clarification.

The last version of these statutes which describes persons protected in terms of contractual relationships is the Arizona version. It protects "a person engaged in reportorial work" but only "information procured for publication in a media with which he was associated or by which he is employed." Thus this statute seems, at first, to be the most lenient in permitting protecion of independent newsmen; but on further inspection, turns out to be the least flexible. When he is compiling his information, an Arizona newsman must not merely be employed; he must be "associated with or employed by a recognized media."

3. Statutes describing the functions performed by the protected person within the news media

This last group of statutes [N.M., La., Ill., Alaska, N.Y.] describes the relationship of the persons protected to the news media solely by describing the news disseminating functions performed by those persons. The persons who fall under the aegis of those statutes generally "collect, write, or edit news for publication through [news media.]" They probably would include both independent, contracting news gatherers and completely independent news gatherers.

In some statutes, where the information protected is only that procured "in the course of their employment," it could be argued that independent news gatherers would not be covered; in others, where the information protected is that procured "while acting as a reporter," an independent news gatherer would certainly be covered.

The New York statute seems to be the only one of this group which does not protect the independent gatherer; it protects information which comes into a news gatherer's possession only when he is acting for a media "by which he is professionally employed or otherwise associated."

B. The listing of the media

The greatest limitation on the persons protected under the state statutes comes not from the descriptions of the relationships between the persons and the media, but from the listings of the media themselves. Unlike some of the federal bills which use general terms to define the media protected, every one of the state laws lists the precise news media which it protects. About a third of the state statutes are even more specific than those Federal bills which also list the protected media; those state statutes define terms such as "newspaper" or "wire service".

None of the state laws use general terms to define the protected media. While some of the statutes [Mich., N.J.] list as protected media only "newspapers", even in those statutes, the meaning of that term has not been extended beyond its generally narrow, lay meaning, and does not include all printed publications. This is true whether or not the statute defines the term "newspaper". Both the California and the Ohio statutes extend their protection to "newspapers" without specifying any further what that term should encompass; courts interpreting those statutes have decided that that term does not encompass a Dun & Bradstreet bi-monthly publication [*Deltec, Inc.* v. *Dun & Bradstreet, Inc.*, 187 F. Supp. 788 (1960)],[2] or *Look* Magazine [*Application of Cepeda*, 233 F.Supp. 465 (S.D.N.Y. 1964)].[3]

Since the term "newspapers" is narrowly construed, the states which want protection of other press-related media have specified what those media are. "Periodicals" [Nev.], "journals" [Md.], "magazines" [N.Y.],[4] and "other publications" [Mich.] are listed as protected in certain states.

"Press associations" (sometimes specifically defined,[5] sometimes not) are protected in half the states.

References to the broadcasting industry are found in the statutes of 15 states [N.Y., N.D., Alaska, Ill., La., N.M., Md., Mon., Ark., Pa., Nev., Calif., Ariz., Alabama, Ken.]

Like the lists of various periodicals, the lists of various broadcast media can be either simple or extensive—a "list" which contains only one media—radio (Ark.) or a list which affords a complete protection to the sources of information broadcast by "wire, radio, TV, cable TV, or fascsimile". [Alaska] About half the state statutes which protect the publications media also protect press associations; about half the state statutes which protect some broadcast media also protect "wire services"

C. *The concern with protecting only the professional press.*

While many of the Federal bills could be construed to protect both the underground and the more conventional press, state laws are so drafted as to not be easily construed as to apply to the underground press.

This concern that only official, commercial news organizations be protected is perhaps best illustrated by the Indiana statute which protects persons connected with:

(1) Newspapers which—

(*a*) are weekly, semi-weekly, bi-weekly or daily and
(*b*) conform to postal regulations and
(*c*) are published for five consecutive years in the same city or town and
(*d*) have a paid circulation of 2% or more of the county in which they are published;

---

[2] *Deltec, Inc.* involved a libel action brought against Dun & Bradstreet, the publishers of bi-monthly reports on the financial status of persons, firms and corporations. The Ohio newspaperman's privilege statute is found in § 2739.12 of the Ohio Code. "Newspapers," as defined broadly in Ohio Code § 2739.11, includes "any periodical sold or offered for sale in Ohio." However, that definition is specifically limited to the term as it appears in §§ 2739.13–18. The newsman's privilege statute, § 2739.12, refers not only to "newspapers", but to "newspapers and press associations". Relying on the section's conspicuous absence from the listing in § 2739.11 and relying on its use of "press association" in addition to "newspaper, the federal district court, construing the term "newspaper" narrowly, decided that it did not include the Dun & Bradstreet publication.

[3] *Application of Cepeda* was another libel case in which California law was applied to a deposition taking place in New York. Cepeda, a baseball player for the Giants, wished to know the identity of the Giant officials who had made certain allegedly libelous statements about him. The California statute protected "newspaper". On the authority of some California libel cases defining "newspapers" and of *Deltec*, the District Court held that a newsman for *Look* magazine was not protected by the California statute. The court compared the California statute with other state statutes "which have more inclusive language," i.e., protect periodicals other than newspapers.

[4] Nothing, including magazines, was protected in New York in 1964, when Judge Tenney in *Applications of Cepeda* decided to apply California, rather than New York law to the deposition taking place in New York. [See Section II, Proceedings Covered, for a discussion of the reasoning behind this decision.]

[5] For an example of a definition, see Alaska where a press association is "an association of [periodicals] engaged in gathering news and disseminating it to its members for publication".

(2) *Recognized* press associations.

(3) *Commercially licensed* radio or television stations and only when they are *bona fide* owners, officials, editorial or reportorial *employees* and only when they receive their prinicpal income from *legitimate* gathering, writing, etc., of news. In four separate ways, the Indiana statute stresses its concern that its protection exend only to "bona fide employees who receive income from legitimate jobs with legitimate news media".

Although none of the other states seem quite as concerned with the problem of "bogus" reporters as does Indiana, most have sought by some means not to extend the protection of their statutes to members of the underground or unprofessional press. Fully a third of the states define the term "newspaper" and all of these definitions preclude publications not having a paid general circulation [N.Y., Alaska, Ill., N.M., Pa., Ind.] It sems to be no coincidence that these are generally states whose definitions of "newsmen" included free-lance newsmen. The other states probably feel that no such definitions are necessary to prevent "bogus" newsmen from claiming the privilege. The scope of their protection is generally limited either by the use of nouns to describe newsmen or by the insistence that the information whose sources are protected be published in a recognized news media. Persons who claim a newsman's privilege in those states must have firm connections with some professional organization. The result of all these limitations is that the privilege granted in most states does not seem to extend to casual newsmen.

D. The inclusion of ex-reporters

While, in most of their descriptions of persons protected, the state statutes are more limited than or, at most, parallel to, the Federal proposals, in one area the specific protection of some of the state statutes is broader than that of the Federal proposals. Some state statutes specifically grant protection to persons who were newsmen when they received the information from the alleged privileged source, but are no longer newsmen at the time the identity of the source is sought. This provision always exists in recently-enacted statutes [La.—enacted in 1970; Ill.—enacted in 1971; Calif.—amended in 1971; see also the N.J. bill which passed the Senate in 1972 and is scheduled to be voted on by the General Assembly]. A recent, narrow construction of the term "newsman" has triggered the inclusion of this provision in state legislation and proposed state legislation. See *Farr* v. *Superior Court*, 22 C.A. 3d 60, 99 Cal. Rptr. 342 (1971).

Our memorandum on Federal proposals did not consider the possibility that the term "newsman" might not be extended to include persons who were newsmen at the time of receiving the information, but not at the time of the command to disclose the identity of the source. If such a narrow interpretation of reporter's privilege legislation exists—as it almost surely does—and is not considered desirable, the Federal proposals should have written into them a provision guarding against such narrow interpretation.

II. PROCEEDINGS COVERED

The methods of describing the proceedings covered by these statutes vary widely from state to state, but most can be placed into two general categories, specific or general. The specific statutes carefully list not only the bodies before which, but also the investigations in which a privilege can be invoked. The general statutes, if they list those bodies or investigations at all, do so in general terms. The Alaska, California and New York statutes contain somewhat unique provisions of describing the proceedings covered by the statute and should be examined separately.

Only one state, Alaska, has a statute setting forth the procedure to be followed when a state privilege is claimed in a federal or foreign state jurisdiction. Since in those instances, the question of whether the privilege can be invoked is out of the hands of the state which grants the privilege, the case law of the forum state, rather than the statutory law of the granting state, determines the result.

Turning to the case law, one finds that a considerable body of Federal case law has evolved around the question of the approach to be followed when a state privilege invoked in a Federal forum. A quick survey indicates that the law of the state or Federal body *granting the greatest reporter's privilege* tends to be followed.

1. The specific statutes.—A typical, specific statute reads:

"[A person need not disclose] in any legal proceeding trial or investigation before any court, grand jury, traverse or petit jury or any officer thereof, before the General Assembly or any committee thereof, before any commission, department or bureau of this Commonwealth, or before any county or municipal body, officer or committee thereof." (Pa.)

The specific statutes [Pa., Nev., Alabama, Ky., Ariz., Mont., Ohio] all list both the type of investigation which is prohibited and the bodies before which it is prohibited. They are all comprehensive in their coverage. Not content with limiting the scope of their protection to judicial, administrative and legislative proceedings (as the Federal proposals do and as the Louisiana statute even more explicitly does), they take care to see that at any stage of any investigation before any officer, the protected person will not have to reveal his source of information. Like all statutes which list categories in detailed, instead of general terms, these statutes run the risk that the judiciary will determine that a type of proceeding not specifically set forth in the statute will not fall within the scope of the statute's protection.

2. *The general statutes.*—The general statutes [Ill., N.M., Md., Mich., N.J., Ark., Ind.] seem to indicate that several state legislatures gave little thought to the types of proceedings to be covered by the statute which they enacted. This casual attitude has not reaped disastrous results; courts do not seem anxious to narrowly construe terms describing proceedings covered. The New Jersey statute, for example, does not mention any specific proceedings covered by the statute, but instead grants a "privilege to refuse to disclose" without indicating where that privilege can be exercised. Nevertheless, a New Jersey court found that a privilege could be asserted at discovery as well as at trial:

> "In view of the sweeping nature of discovery rules, which are designed to insure the ability to obtain all relevant facts before trial, this court perceives no distinction between the claim of a privilege at discovery and a claim at trial." *Beecroft v. Point Pleasant Printing & Publishing Co.*, 82 N.J. Super. 269, 197 A. 2d 416 (1964).

With such statutory construction, general descriptions of proceedings covered, such as "before any proceeding, by any authority" [N.M.] or "in any inquiry authorized by this code" [Mich.], are sufficient protection for newsmen. Although problems might arise when the statute specifies one body, or one type of investigation [Md.], as long as the courts recognize that, to be effective, a privilege must extend to every legal proceeding, the wording of the general statutes remains fully as able to protect newsmen as the wording of the more specific statutes.

3. *The unique statutes.*—One specific and two general statutes remain to be discussed. The specific statute is that of Alaska. It does not set forth the types of proceedings to which the statute applies. However, it sets forth in elaborate terms the procedures to be followed when invoking or divesting the privilege. These procedures differ depending on whether the privilege is invoked before the Alaska Supreme Court or the Superior Court (in which case it can be divested only by an order of the Supreme or Superior court). The Alaska legislature obviously expected that the protection of the Alaska Statute would extend to every conceivable proceeding, although this intention is implied in the statute rather than specifically stated.

The two general statutes which have yet to be discussed are the New York and California statutes. These statutes cover investigations before "any body having contempt power" [N.Y.] or prevent any protected persons "from being adjudged in contempt for refusing to disclose any news." [N.Y.] This emphasis on curbing the contempt power of the courts seems to be an effective way of extending the application of the statutory privilege to all proceedings. It seems that a citation for contempt, whether resulting in a fine or in a jail sentence, is the only real tool by which any body can react to a reporter's failure to disclose information. If so, a prevention of the use of that power could be a simple, effective way to provide a privilege with regard to inquiries as to a newsman's source before all proceedings.

B. Federal proceedings covered.

Newsmen have successfully invoked state reporter's privilege laws in Federal Courts in certain instances. Professionals other than reporters have, of course, also invoked the privilege granted to them by law in Federal Court proceedings. Although the decisions in those cases are useful in determining whether or not a reporter's state privilege could, under similar circumstances, be invoked. they are too numerous and their issues are often too tangential to reporter's privilege to be carefully examined here. This study examines in detail only those decisions in which a reporter's privilege was invoked.

1. *Types of Federal suit.*—For purposes of analyzing whether a Federal Court will follow the law of the forum state with respect to privileged communications, the cases coming before the Federal Courts may be divided into three groups: Federal criminal cases, Federal question cases, and diversity cases. *See* 95 ALR 2d 320 (1964).

Federal criminal cases are governed by the Federal Rules of Criminal Procedure and no state reporter's privilege is recognized. *Caldwell* v. *United States*, 311 F.Supp. 358 (N.D. Cal. 1970), 434 F.2d 1081 (9th Cir. 1970), *aff'd sub nom. Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d. 626, 92 S.Ct. 18a (1972). This means that a Federal grand jury is always free to investigate without the shackles of state newsman's privilege legislation.

Federal question cases are sometimes governed by the Federal, and sometimes by the state, privilege law. Since reporters are not often called upon to testify in those cases, the extent to which a reporter's privilege could be invoked in those instances has not yet really been determined. Federal diversity cases are ostensibly governed by the rule that the substantive law of the forum state shall apply. *Erie* v. *Thompkins*, 304 U.S. 64 (1938). The reporter's privilege legislation is generally considered to be procedural rather than substantive law. *Ex Parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953). Federal Courts, when exercising their discretion, have nevertheless often chosen to apply the state privilege law rather than the non-existant Federal privilege law. Furthermore, given a choice between the laws of two states, one of which has a privilege and the other of which does not, a Federal Court has chosen to apply the law of the state with the privilege. *Application of Cepeda*, 233 F.Supp. 465 (S.D.N.Y. 1964).

2. *Diversity cases.*—In those diversity cases where the trial state and the forum state are the same, the state law rather than the Federal law is applied without much deliberation on the part of the Federal court. *Deltec, Inc.* v. *Dunn & Bradstreet, Inc.*, 187 F.Supp. 788 (N.D. Ohio 1960) [state with reporter's privilege statute]; *Adams* v. *Associated Press*, 46 F.R.D. 439 (S.D. Texas 1969) [state without reporter's privilege statute].

When a foreign deposition is taken in a Federal Court case, however, the trial state and the forum state will differ; the Federal Court must then decide which of the two state laws to apply. Recognizing that it was not bound to do so, a Federal district court permitted a reporter who was being deposed in Alabama to invoke the Alabama privilege statute, even though the main action was being tried in New York. *Ex Parte Sparrow, supra.*

The next case in which a similar situation occurred arose in New York. New York, the forum state, had at that time no "shield" law, while California, the trial state, had one. Relying on the rationale, but not on the precise holding of *Ex Parte Sparrow, supra*, Judge Tenney of the Southern District of New York decided that the law of California should apply. *Application of Cepeda, supra* (dictum).

The question of which law to apply was also presented in *Baker* v. *F. & F. Investment*, 339 F.Supp. 942 (S.D.N.Y. 1972). In that case the forum state was New York, the trial state, Illinois. Both states had "shield" laws. Judge Bonsal found that "it is immaterial whether the Illinois or New York or both statutes are concerned, since both statutes enunciate substantially the same public policy." 339 F.Supp. at 944.

In a nutshell, the law today seems to be that the investigation in a federal district court will not infringe on the areas that either the public policy of the forum state, the trial state or the Federal system wishes to be protected from inquiry. *Contra, Cervantes* v. *Time, Inc.*, 464 F.2d 986 (1972) (dictum).

The passage of a Federal newsman's privilege statute would probably have significant effects on this body of law. Since reporter's privilege legislation has been declared procedural, rather than substantive law, the Federal law might gain ascendancy over the state law. Certainly this is what the Proposed Federal Rules of Evidence contemplate. See Advisory Committee's Note, p. 71, *Preliminary Draft of Proposed Rules of Evidence* (1969 edition). This conflict of laws question remains one of the unanswered questions surrounding both proposed federal and state legislation.

III. NATURE OF MATERIAL PROTECTED

The ultimate issue in any case in which a reporter's privilege is invoked under a state statute will be whether the information sought falls within that statute's provisions relating to the nature of materials protected from disclosure. For, in its definition of the materials it protects, a statute delineates the kind of information which it feels should remain undisclosed so that other information may be given to the public. To define the nature of materials protected, particularly in a statute which grants, as do most of the state statutes, an unqualified privilege, is to balance the public need for information against the public or private need to pursue the detection of wrongdoers. The statutory provisions relating to this area of the reporter's privilege statutes deserve, therefore, the most careful scrutiny.

The nature of the material protected can be defined by answering three questions:

(1) What must the newsman be doing when he receives the information?

(2) Must the information be given in confidence, and what does "in confidence" mean?

(3) Is only the identity of a source of information protected from disclosure or is the information obtained also protected? What constitutes a "source" of information?

By far the greatest number of cases which have arisen under the reporter's privilege legislation are concerned with answering the last two questions.

A. What the newsman must have been doing when he received the information.

The state statutes, like the Federal proposals, are not designed to grant a reporter a privilege when he is acting in the capacity of an ordinary citizen. It is perhaps surprising, then, that only two statutes specificially limit the protection against compelled disclosure as to sources of information which a newsman obtains "while engaged in a news-gathering capacity." [Alabama, N.Y.] Several other statutes protect against compelled disclosure of a source of information obtained in the course of a newsman's activities. Other state statutes achieve this same effect by two similar routes: they grant a privilege as to that information which has been procured for and published in certain specified media, or grant the privilege only to information procured for publication in specified media.

1. Statutes protecting information obtained in the course of a newsman's activities.—In these statutes, a newsman's source is protected if the information was procured by him "in the course of his employment." [Alaska, N.M., La., Ill., Mont., Ohio] This does not mean that a newsman who is employed is protected from revealing the sources of all information he receives; "in the course of his employment" means "in the course of his activities as a newsman." Some of these statutes [Alaska, N.M., La.] explain what these activities are more elaborately than others do; but the intent of all of these statutes appears to be the same: a newsman is protected from revealing his sources of information obtained while working in his professional capacity.

2. Statutes protecting information which has been published or was obtained to be published.—Whether these statutes protect only the sources of information which has been published [Ark., Md., Ken., Calif., N.J.] or sources of information which is obtained or procured for publication [Ind., Ariz., N.Y.] is a matter of state preference. In either case, one of the effects of this wording as it has been interpreted is to protect only sources of information which a newsman procures in a newsman's capacity. The particular effect of this language is illustrated in the Maryland case of *State* v. *Lightman*, 294 A.2d 149 (Md. Spec. App. 1972), *aff'd per curiam*, No. 233 (Md. App., October 7, 1972). In that case, a reporter who had been cited for contempt conceded that, under Maryland's published-material-only statute,

"If a reporter chances on an act of violence being perpetrated on the street, he may not claim a newsman's privilege and thereby avoid describing what he saw or decline to identify the perpetrator on the ground that he subsequently described in a newspaper story what he witnessed." 294 A.2d at 155.

Sources of information which have been procured or obtained by a newsman and subsequently published are thus deemed, under this interpretation, to be privileged only when such information was procured in a newsman's capacity as a newsman. Any other construction of "procured and published information" would not really be in conformity with the purposes of newsman's privilege legislation.

3. Statutes not concerned with the capacity in which the newsman was acting.—Three of the statutes [Mich., Pa., Nev.] have no provisions relating to the capacity in which a newsman must be acting when he received the information in order for the privilege to apply. This omission need not present any difficulty in properly applying such a statute; a court, like the Maryland court, can still interpret the statute as protecting newsmen only when they are acting in a newsman's capacity. The difficulty with this omission is that it could, in a proposed statute, provoke fears of misapplication among the legislature. To prevent such worries, a clarification of this area of the privilege would be desirable.

B. Information as Distinguished From the Source of Information

Statutes.—Sixteen of the eighteen state newsman privilege statutes extend only to the disclosure of a source of a newsman's information. In these states the newsman has no privilege to refuse to disclose the nature of the information given to him by a source and, *a fortiori*, the newsman cannot assert a privilege as to any information which he has personally observed. Two of these sixteen statutes use language beyond the word "source" of information.

The Louisiana statute protects newsmen from disclosure of "the identity of any informant or any source of information obtained by him from another person." This statute seems to protect the identity of a first-hand source and a second-hand source.

The New Jersey statute affords newsmen protection against revealing any "source, author, means, agency or person from or through whom any information published in such newspaper was procured." This language was an amendment to a former statute which only protected a "source" of information.

Only two statutes protect from disclosure the information received from a source. The Michigan statute provides for an absolute privilege as to "comunications" between reporters and their informants. This language appears to protect from disclosure the substance of information communicated by an informant to a reporter. However, the statute could be strictly construed so as to deny a privilege as to the identity of the *source* of a "communication." This statute would appear not to protect from disclosure events or information which a reporter personally observes.

The New York statute seems to provide a protection from disclosure of information even to the extent of information personally obtained from other than an informant. The statute extends the privilege to "news or the source of any such news coming into his possession." "News" is defined in the statute as: "written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting public welfare." This statute would seem to encompass a protection against forced disclosure of almost every conceivable type of information gathered by a newsman, yet some of the cases interpreting the New York statute have held that the statute does not extend the privilege to information personally observed by a newsman. (See cases discussed in Section C., *infra.*)

Case Law.—The Pennsylvania Supreme Court has construed the word "source" in the Pennsylvania statute, *In Re Taylor*, 412 Pa. 32, 193 A. 2d 181 (1963). A subpoena served upon the officers of a newspaper to appear before a grand jury, and to produce certain documents, related to their investigation of a politician and the statement made by him to the District Attorney regarding corruption in the local government. The officers appeared, but refused to answer certain questions. They were held in contempt on the basis that the Pennsylvania statute protects newsmen against the disclosure of the identity of persons and does not protect against compulsory disclosure of documents or other inanimate objects. The trial judge held that, as to certain documents and tape recordings, evidencing what the politician had told the reporters, the newspaper had waived its privilege by revealing in its article that the politician was questioned by the District Attorney with regard to what he had told the newspaper reporters.

The Supreme Court of Pennsylvania construed the language of the Pennsylvania statute, which protects newsmen against disclosure of "the source of any information procured or obtained by him," so as to include within the term "source" not only the identity of a person, but likewise documents, inanimate objects and all sources of information. Additionally, the court held that the newspaper had not waived its privilege because any statements made by an informer to a newspaper which are neither actually published or publically disclosed (as was the situation in this case) are protected by the statute.

In *State v. Sheridan*, 248 Md. 320, 236 A. 2d 18 (1967) the State's Attorney attempted to compel a reporter to testify before the grand jury as to the details of a conversation between the reporter and his source of information. The reporter admitted the name of his source of information obtained in connection with the reporter's investigation of suspected irregularities in certain administrative zoning decisions, but refused to discuss the nature of the information received.

The trial court sustained the reporters claim of privilege under the Maryland statute. The Maryland Court of Appeals dismissed the State's appeal as moot since the term of the grand jury had ended, but the Court noted that the trial judge's ruling was "somewhat inexplicable since the statute makes inviolate only 'the source of any news or information' and not the 'news or information' itself."

The *Taylor* decision, *supra*, was discussed and criticized in a footnote to the decision in *State v. Sheridan, supra*, for its failure to discriminate between the source of the information and the information.

In *State v. Donovan*, 129 N.J.L. 478, 30 A. 2d 421 (Sup. Ct. 1943) the New Jersey statute was interpreted so as to hold that the fact that a source of information was privileged would not protect disclosure of the name of a messenger who brought an article of known authorship to the newspaper. Subsequent to that decision, the New Jersey Legislature expanded the word "source" in the former statute so as to read "source, author, means, agency, or person from or through any information published in such newspaper was procured, obtained, supplied, furnished or delivered."

In the recent case of *Bridge v. New Jersey* (Superior Ct. of N.J., Appellate Div., September 12, 1972), a reporter published an article stating that Mrs. Pearl Beatty, a Commissioner of the Newark Housing Authority, told him that she had been offered a bribe. Mr. Bridge was held in contempt for refusing to answer questions before the grand jury regarding information provided to him by Mrs. Beatty relating to the bribe. Bridge argued that the New Jersey statute protects from disclosure the source of information, which not only includes the identity of an informant but also protects that part of an informant's statements not published. This argument was rejected by the Superior Court of New Jersey, Appellate Division, and certiorari to the New Jersey Supreme Court was denied.

Activities Personally Observed Distinguished From a "Source" of Information.

The Court in *In Re Dan*, No. ——, (Supreme Ct., Wyoming Ct., N.Y., September 14, 1972,) held that the element of confidentiality implicit in the New York statute was not present and therefore a newsman's privilege did not arise, where the information sought from the reporter related to activities which he personally observed.

Two other courts have construed their state statutes to hold that where a reporter observes illicit activities by persons providing information to a reporter for the purposes of publication, such persons are not a "source" of information with the terms of the statutes and therefore the disclosure of their identity is not protected.

The Kentucky statute protects a newsman from disclosure of "the source of any information procured or obtained by him, and published . . ." The Kentucky Court of Appeals has held that this statute does not permit a reporter to refuse to testify about events personally observed, including the identities of those persons he observed. *Branzburg v. Pound*, 461 S.W. 2d 345 (Ky. 1970), *aff'd such nom. Branzburg v. Hayes*, 408 U.S. 665, 33 L.Ed. 2d 526, 92 S. Ct. 18 a (1972).

Branzburg was the author of a published newspaper article describing in detail his observations of two persons synthesizing hashish from marihuana. Branzburg had promised not to reveal the identity of these persons and when he refused to do so before a grand jury, he was held in contempt. On appeal, Branzburg argued that the language of the Kentucky statute justified his refusal because the object of a newsman's observation is itself a "source of information." The court rejected this argument, stating:

"*Information* as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the methods by which or to the person from whom he learns them.

In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the information obtained by him, but their identity was not the source of the information.

The actual source of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have not doubt that the identity of the informant was protected by the statute." 461 S.W.2d at 347.

In *Lightman v. State*, 294 A.2d 149 (Md. Sp. App.) *aff'd per curiam*, No. 233 (Md. App., October 7, 1972), the Maryland Special Court of Appeals, reached the same result as that in *Branzburg* in applying the Maryland Statute to a situation where a person gave a reporter on-the-scene information which revealed her participation in illegal activities: "that the shopkeeper gave on-the-scene information which revealed her complicity in illegal activities means only that she informed against herself; as in *Branzburg*, that fact cannot be extended to protect her identity as a participant in the illegal activities." 294 A.2d at 157.

C. Confidential Source/Information v. Non-Confidential Source/Information

Statutes.—None of the statutes protecting disclosure of a newsman's source of information state that, in order for the privilege to arise, the source must be a confidential one. The New York statute, which protects "news" in addition to the identity of a source of such "news," does not state that the "news" must be confidential. The Michigan statute declares that communications between reporters and their informants are "privileged and confidential." This statute seems to say that the element of confidentiality exists without regard to the intent of the informant.

Case Law.—One basis for the enactment of a newsman's privilege statute is to protect the newsman's accessability to confidential sources without deterring these sources from revealing information for fear of disclosure of their identity. Recognizing this, some courts have held that when a source of information or information is obtained by a newsman on a non-confidential basis, a privilege does not arise under the statute because the element of confidentiality is implicit in the statute. Other courts have not adopted this position.

Confidential v. Non-Confidential

In re WBAI–FM, 68 Misc. 2d 355, 326 N.Y.S. 2d 434 (1971) involved the following facts:

A radio station moved to quash a subpoena duces tecum issued by the grand jury requiring the station to produce a letter provided to the station by the "Weather Underground." The letter related to an explosion in a building. That incident was being investigated by the grand jury. In denying the station's claim of a privilege under the New York statute, the judge found that because the contents of the letter itself had been made available to the public by the station and other media, "there can be no question of confidentiality in that respect." 68 Misc. 2d at 358, 326 N.Y.S. 2d at 437.

"The perpetrators of the criminal act in the building at Albany do not seek the privilege for their communication which was voluntarily made by them and passively received by Station WBAI–FM. Rights of dissident groups to expression of views and to have the source of such expressions kept confidential might well be protected by Section 79–h. To hold that the exercise of these rights transcends the enforcement of the criminal law would approach the ludicrous where no confidences were involved and where the media was not exercising a news gathering function when the information was given." 68 Misc. 2d at 358, 326 N.Y.S. 2d at 437.

The New York Supreme Court, Trial Term Albany County, adopted a similar view regarding confidentiality. *People v. Wolf* 69 Misc. 2d. 256, 329 N.Y.S. 2d 261 (1972). The *Village Voice* published an article regarding the riots in New York's Tombs prison under the by-line of one of the inmates indicted for participating in the riots. The District Attorney served a subpoena duces tecum upon the *Village Voice* to produce the original manuscript.

In moving to quash the subpoena, the affidavit of the person who received the manuscript stated that the manuscript was received in a confidential manner based upon a relationship of trust with the inmates. The court held, however, that the element of confidentiality was implicit in the New York Statute:

"[T]he information or its sources must be imparted to the reporter under a cloak of confidentiality, i.e. upon an understanding, express or implied, that the information or its sources will not be disclosed . . ."

The court held that since the newspaper published the manuscript and identified its author that there was no privilege under the New York Statute to refuse to produce the manuscript.

The Supreme Court, Appellate Division, First Department, affirmed the decision *per curiam* agreeing that the intent of the New York statute is that the privilege shall apply only where information is received "under the cloak of confidentiality." *People v. Wolf*, —Misc. 2d.—, 333 N.Y.S. 2d. 299, 301 (1972).

In a recent case, the Court of Special Appeals of Mayland adopted a rule of strict construction of the Maryland statute affording a newsman's privilege, but nevertheless did not agree with the State's argument that the element of confidentiality is implicit in the statute. *Lightman v. State*, 294 A.2d 149 (Md. Sp. App., 1972), *aff'd per curiam*, No. 233 (Md. App., October 7, 1972). Lightman was a newspaper reporter who visited a pipe shop on the Ocean City Maryland boardwalk and, not informing the shopkeeper that he was a reporter, obtained information regarding the dissemination of drugs in the shop to customers. This information was published in an article. A grand jury asked the reporter to disclose the location of the shop and the description of the shopkeeper. In the contempt hearing the State argued that the element of confidentiality was not present because the shopkeeper was not aware that the person he spoke to was a reporter. The Court held:

> "[W]hile the Legislature may have enacted the statute with the primary purpose in mind of protecting the identity of newsmen's confidential sources, we think the statutory privilege broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not." 294 A. 2d at 156.

The most recent case on this point involves another interpretation of the New York statute. *In re Dan*, No. — (Supreme Ct., Wyoming County, N.Y., September 14, 1972). A reporter refused to testify before a grand jury as to the events which he observed while at the Attica Correctional Facility during the prisoner takeover.

The court found that none of the information the reporter obtained was given to him in confidence by a person requesting that his name not be disclosed. Relying on *People v. Wolf, supra*, the court denied the privilege, holding:

> "The activities which the grand jury are inquiring of the witnesses are the events or acts witnessed by others and related to them under the cloak of confidentiality." Memorandum at 8.

IV. CIRCUMSTANCES UNDER WHICH THE PRIVILEGE MAY BE DENIED

Statutes

A. Circumstances Outweighing The Benefits of The Privilege

Twelve of the eighteen state statutes do not set forth any circumstances under which the privilege conferred by the statute may be successfully challenged. Two of the remaining six statutes set forth only one limited situation under which the assertion of the privilege may be denied. The remaining four statutes describe the conditions under which the legislatures felt the benefits of the privilege would be outweighed by the benefits of disclosure.

Of the twelve statutes not providing for a conditional privilege, only three were enacted after 1960. On the other hand, of the eight statutes enacted since 1960, four of the statutes provide for rather broad qualifying conditions to the privilege. Except for the limited qualification to the privilege in the Arkansas statute, all the qualified privilege statutes were enacted after 1960.

The Pennsylvania statute grants only one qualification to the privilege. The privilege shall not apply to radio and television stations unless the station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

The Arkansas statute confers a privilege as to the source of information used as a basis for an article unless the person seeking disclosure can show:

> "[T]hat such article was written, published or broadcast in bad faith, with malice, and not in the interest of public welfare."

The statutes of Alaska, Louisiana, and New Mexico provide for a qualified privilege in language which permits a wide latitude of discretion by the Court in deciding whether the privilege should be granted in a given case.

The Alaska statute provides that the Court may deny the privilege if it finds that withholding testimony by a reporter would:

> "(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege or (2) be contrary to the public interest."

The New Mexico statute confers the privilege unless disclosure "be essential to prevent injustice." The Louisiana statute permits the privilege to be revoked when the court finds that the disclosure "is essential to the public interest."

The qualifications ot the privilege in the Illinois statute are specific and therefore more limited. The privilege may be divested in Illinois only if the Court finds the following:

"(a) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this state or of the federal government; and

"(b) that all other available sources and information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved."

The New Mexico and Illinois statutes provide that the court will consider the following factors in determining whether the privilege should be granted or denied:

(1) The nature of the proceedings
(2) the merits of the claim or defense
(3) the adequacy of the remedy otherwise available, if any
(4) the relevancy of the source
(5) the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

B. Waiver of the Privilege

The statutes of only two states contain provisions explicitly setting forth the circumstances under which the privilege, otherwise conferred, may be waived. The Nevada statute provides as follows:

"49.385 *Waiver of privilege by voluntary disclosure.* 1. A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter. 2. This section does not apply if the disclosure is itself a privileged communication.

49.395 *Privileged matter disclosed under compulsion or without opportunity to claim privilege.* Evidence of a statement or other disclosure or privileged matter is inadmissible against the holder of the privilege if the disclosure was: 1. Compelled erroneously; or 2. Made without opportunity to claim the privilege."

The New Jersey statute is more detailed, providing:

"2A:84A-29 *Waiver of privilege by contract or previous disclosure: limitations.* A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question. L. 1960, c. 52, p. 459, § 29."

C. Actions for Defamation

Only two state statutes have provisions relating to the assertion of a newsman's privilege in a suit for defamation. The Illinois statute provides that the privilege is not available in a defamation action "in which a reporter or news medium is a party defendant." The Louisiana statute provides that where a reporter or news media raises the defense of good faith in a defamation action "with respect to an issue upon which the reporter alleges to have obtained information from a confidential source," the burden of proof shall be on them to sustain this defense.

Case law

A. Overriding Considerations

In *Baker v. F & F Investment*, 339 F. Supp. 942 (S.D. N.Y. 1972), Judge Bonsal expressed the view that the statutes of New York and Illinois both annunciate substantially the same public policy regarding qualifications to the privilege conferred by those statutes.

The Illinois statute provides that the privilege is not available in an action for defamation in which a reporter is a defendant, and that the privilege may be divested if the Court finds that all other sources of information have been explored and that disclosure is essential to the public interest. Judge Bonsal found that the person seeking disclosure had not shown that the existence of either of these qualifying conditions were present and that, balancing the interests, the motion to compel disclosure should be denied. Although the Illinois statute sets forth specific circumstances under which the newsmen's privilege may be denied, the New York statute does not provide for any specific circumstances warranting denial of the privilege as to the disclosure of the source of information or the information itself. Nevertheless, Judge Bonsal found his determination to be consistent with the public policy of New York as well as the public policy of Illinois.

In construing the New York statute in *In Re WBAI–FM*, 68 Misc. 2d 355, 326 N.Y.S. 2d 434 (1971), the Albany County Court determined that the protection given the press by the New York statute must be subservient to the furtherance of public policy requiring the investigation of crime and prosecution thereof, at least where the information is only passively received by the news media. Thus, this court also read the qualification into the New York statute that a newsman's claim to a privilege may be denied when the court finds an overriding public interest.

B. Alternative Means for Obtaining Identity of Source

The Court found in *Application of Cepeda*, 233 F. Supp. 465 (S.D. N.Y. 1964) that there was no privilege under the California statute for a reporter to refuse to disclose, during the taking of his deposition, the name of an official of the San Francisco Giants who allegedly supplied information to the reporter as a basis for an article which brought about an action in libel against the reporter's magazine. California's statute has no provisions relating to whether the person seeking the source of a newman's information can do so by means other than inquiry of the newsman. Nevertheless, the court's decision discussed this issue in dictum.

The reporter told the District Court Judge that he refused to testify "until all possible means of illiciting that information from other sources have been exhausted." The judge found that since the article was based in part in inferences and implications which the reporter drew from the statements of the Giants' officials, and an inference can be drawn without being clearly attributable to any one source, then only the reporter would be capable of knowing and revealing the source of the inference which he obtained. The court, in requiring disclosure, also noted that the plaintiff's attorney had deposed four of the Giant officials without success in obtaining the source of the reporter's information. The judge therefore found that the plaintiff had no access to alternative means of discovering the reporter's source and the plaintiffs' motion to compel the defendant to answer in the oral deposition was granted.

C. Defamation

In *Brogan v. Passaic Daily News*, 22 N.J. 139, 123 A. 2d 473 (1956), the New Jersey Supreme Court, in construing the former New Jersey statute on newsmen's privilege, held that where a newspaper raises the defenses of fair comment and good faith and a reporter testifies that the information is an article which is the subject of an action for defamation came from a reliable source, the newspaper, in effect, waives its privilege. This holding was in spite of the fact that there was no language in the New Jersey statute at that time regarding the waiver of the privilege under this circumstance.

In *Beecroft v. Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964), a New Jersey Superior Court noted that when the present New Jersey statute regarding newsmen's privilege was enacted in 1960, the state legislature was aware of the *Brogan* decision and therefore, since the statute was not changed with regard to that issue, the *Brogan* decision was controlling in denying the claim of a newspaper of the privilege in an action for defamation.

D. (1) Statutory Waiver Provisions Construed

In the *Beecroft* case, *supra*, the court recognized that the New Jersey statute set forth the specific situations in which the waiver of the privilege could occur. The court concluded, however, that even though the legislature set forth only two instances of statutory waiver, a waiver could also occur just as effectively from other acts. The court therefore held:

"Thus, the voluntary interjection in the present case of the defenses of fair comment, good faith, truth, and lack of malice, while conceivably not within the scope of a waiver as defined by N.J.S. 2A:84A-29(b), N.J.S.A., can nevertheless be viewed as an act constituting an effective waiver as such."

The court stated that "concepts of fairness and justice" requiring that the plaintiff have the right to cross-examination of the source are paramount to the policy in favor of the newsman's privilege.

The New Jersey statute provides that a newsman waives the privilege if he makes or consents to disclosure of "any part of the privileged matter." In the recent case involving Peter Bridge (the facts of which are discussed at p. 27), the Superior Court of New Jersey, Appellate Division, (opinion dated September 12, 1972) found that Bridge revealed his source of information and at least part of the information given to him by his source and the court therefore held that Bridge waived his privilege.

D. (2) Voluntary Disclosure Deemed Waiver

There are several cases that indicate that where voluntary disclosure of a source of information is made by a reporter, then the reporter is no longer in a position to assert the privilege. In effect, the courts are holding that a reporter has thus waived his privilege although this determination is made in the absence of any waiver provision in the particular state statute.

In *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S. 2d 291 (1972), the court was required to rule upon the motion of the newspaper to quash a subpoena duces tecum which demanded the original manuscript of an an article published in the *Village Voice* which consisted of a purported confession of one of the inmates participating in a New York Tombs riot. The court held that since the manuscript was published and was under the byline of the inmate's name that the newspaper had voluntarily disclosed the manuscript and its source and thereby waived any possible protection of the New York newsman's privilege statute. The appellate court affirmed the trial court *per curiam*, *People v. Wolf*, —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972), but hinted that the *Village Voice* would have had a much stronger case if they had proved their contention that the original manuscript submitted by the inmate may have been edited by the newspaper. Such proof, of course, would establish that not all of the manuscript was disclosed by publication.

A more recent New York case, *In re Dan*, No. —— (Supreme Ct., Wyoming City, N.Y., Sept. 14, 1972), involved the State Attorney General's motion to compel two witnesses (a reporter and a photographer) to testify before the grand jury a to events they observed during the Attica disturbance. The court found that one of the witnesses had already made certain statements to the Assistant Attorney General regarding what he observed during the riot, that this constituted a "publication," and the information sought by the grand jury relating to what the reporter disclosed to the Assistant Attorney General was waived and not privileged.

Like the New York statute, the California statute regarding newsman's privilege does not contain any provisions regarding waiver of the privilege by voluntary disclosure of a source of information. In the case of *Application of Howard*, 36 C.A. 2d 816, 289 P. 2d 537 (D.C. of Appeal, 3rd Dist., Cal. 1955), the court seemed to recognize that voluntary disclosure of the source of information could defeat the right to the privilege, but under the facts of that particular case the court ruled that voluntary disclosure had not been made. A reporter wrote a story regarding a labor dispute referring to and quoting a statement of a union officer as follows:

" 'We'll observe the order,' Andrade told the special meeting. 'But as individual American Citizens, anyone has the right to refuse to handle hot apples . . .' " 289 P. 2d at 537.

The reporter was asked if he had a conversation with Andrade on a certain day of the labor dispute and the reporter refused to answer. The trial court found that the reporter waived the privilege since his article had disclosed the source of his information. The appellate court, in finding that the reporter did not disclose the source of his information for the article, stated that it could not be assumed from the use of quotation marks that the statement attributed to Andrade was made directly to the reporter.

"The literary form in which information secured for publication is cast does not necessarily disclose the source from which it is obtained." 289 P. 2d at 538.

The decision in *In Re Taylor,* 412 Pa. 32, 193 A.2d 181 (1963), reached a similar result as that of the *Howard* case. The newspaper published an article regarding the interrogation of a politician by the district attorney. The article stated that many of the questions posed to the politician by the district attorney related to what the politician had told the reporters of the newspaper. The trial court found that this situation constituted a waiver of the newspaper's right to assert the newsman's privilege, under the Pennsylvania statute, against disclosure of documents and tape recordings evidencing what the politician had told the reporters of the newspaper. The Supreme Court of Pennsylvania disagreed. They held:

> "A waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper." 193 A.2d at 186.

V. PROCEDURE

Statutes

A. Procedure To Divest Privilege

Since twelve of the eighteen state newsman's privilege statutes provide for an absolute privilege against the disclosure of a newsman's source of information, without any qualifying circumstances, it is not surprising that only three statutes set forth procedures for challenging the assertion of the privilege.

The Alaska statute sets forth the most detailed procedures of the three statutes containing procedural provisions. These procedures are summarized as follows:

1. If during a hearing before any of the bodies set forth in the statute a reporter refuses to divulge the source of his information, the person seeking the information may apply to the superior court (or if the issue is raised before the Supreme Court the application will be made to that court) for an order divesting the reporter of the privilege.
2. The application (by verified petition) shall set out the reasons why disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. [These are the circumstances upon which the court may deny or limit the privilege.]
3. In a proceeding before the Supreme Court or a superior court the court may challenge the privilege on its own motion.
4. Where the privilege is initially asserted before the Supreme Court or superior court, the court may conduct an inquiry by way of questions put to the reporter and make a decision at that time or may inquire by way of other witnesses or documentary showing. Or the court may order a special hearing of the same nature as the hearing to be conducted upon an application relating to proceedings before other bodies of the state or local government.
5. The court may deny the privilege if it finds that the circumstances set forth in the statute exist, and may limit the testimony and right of cross-examination "as may be in the public interest or in the interest of a fair trial."
6. An order of the superior court shall be subject to review by the Supreme Court and the privilege shall remain in effect during the pendancy of the appeal.

The procedural provisions of the Illinois statute are very similar to those of the Alaska statute. The Illinois statute provides that a person seeking information claimed to be privileged by a reporter may apply to the court for an order compelling disclosure. The application shall allege:

> [T]he name of the reporter and of the news medium with which he was connected at the time of the information sought was obtained; the specific information sought and its relevancy to the proceedings; and, a specific public interest which would be adversely affected if the factual information sought were not disclosed.

In addition to setting forth the specific circumstances which must exist if the privilege is to be denied, the statute sets forth several specific factors which the court shall consider in ruling upon an application to divest the privilege.

The Louisiana statute also provides that a person may seek to divest a reporter's claimed privilege by application to the court, and, after a hearing, the court may deny the privilege if the qualifying circumstance exists. Unlike the Alaska or Illinois statutes, the Louisiana statute provides that the application may be made to the district court of the parish in which the reporter resides, and only if the reporter is not a resident of the state shall the application be made to district court of the parish where the proceeding in which the information is sought pending.

B. Burden of Proof

Only one of the statutes sets forth the person who has the burden of proof in a proceeding to determine if a newsman's privilege should be granted.

The Arkansas statute provides that in order for a newsman's privilege to be denied, "it must be shown that" one of the circumstances specified as a grounds for denial exists. It seems that this language places the burden of proof upon the person seeking the information.

The Louisiana statute has a provision requiring that where a reporter or news media asserts a legal defense of good faith in an action for defamation, and where the reporter alleges to have obtained the information at issue from a confidential source, the privilege against disclosure of the source shall be granted, but the burden of proof shall be on the reporter or news media to sustain this defense.

As to the three statutes providing for a proceeding to challenge the assertion of the privilege: since the person seeking the information must initiate the proceeding by application to compel disclosure, in the absence of any statutory provision regarding burden of proof the usual rule is that the moving party has the burden of proof.

Case Law

C. Types of Proceedings

The court cases interpreting the state statutory provisions regarding a newsman's privilege have arisen in a number of procedural contexts, summarized as follows:

1. *Grand Jury Proceedings:*

a. Motion to quash subpoena duces tecum: *In re WBAI–FM*, 68 Misc. 2d 355, 326 N.Y.S. 2d 434 (1971).

b. Motion of state's attorney to compel witness to testify before grand jury: *In re Dan*, No. —— (Supreme Ct., Wyoming Cty. N.Y., September 14, 1972); *State v. Sheridan*, 248 Md. 320, 236 A.2d 18 (1967).

c. Appeal of judgment of contempt for refusal to answer questions: *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *Bridge v. New Jersey*, (Superior Ct. of N.J., Appellate Div., September 12, 1972); *Lightman* v. *State*, 294 A.2d 149 (Md. Spec. App. 1972), *aff'd per curiam*, No. 233 (Md. App. October 7, 1972).

2. *In preparation for trial;* Motion to quash District Attorney's subpoena duces tecum: *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S. 2d 291 (1972), *aff'd per curiam*, —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972).

3. *Civil Action Discovery*

a. Rule 37(a) motion to compel deponent to answer questions: *Application of Cepeda*, 233 F. Supp 465 (S.D.N.Y. 1964); *Baker* v. *F. & F. Investment*, 339 F. Supp. 942 (S.D.N.Y. 1972); *Ex parte Sparrow*, 14 F.R.D. 351 (N.D. Ala. 1953).

b. Motion to strike interrogatories: *Beecroft* v. *Point Pleasant Printing & Pub. Co.*, 82 N.J. Super, 269, 197 A.2d 416 (1964); *Delta, Inc.* v. *Dun & Bradstreet, Inc.*, 187 F.Supp. 788 (N.D. Ohio 1960),

4. *Habeas Corpus petition seeking relief from contempt order* for failure to answer questions at hearing on preliminary injunction: *Application of Howard*, 136 CA. 2d 816, 289 P. 2d 537 (1955).

5. *Appeal of criminal conviction: Lipps v. State*, —— Ind ——, 21 Ind. Dec. 342, 258 N.E. 2d 622 (1970); *Hestand v. State*, —— Ind ——, 27 Ind. Dec. 85, 273 N.E. 2d 282 (1971).

Burden of Proof

In two instances, the courts placed upon the newsmen the burden of proving the privileged nature of a source of information or information. See *Application of Cepeda*, 223 F.Supp. 465 (S.D. N.Y. 1964) [citing *Tatkin v. Superior Court*, 160 Cal. App. 2d 745, 753, 326 P. 2d 201, 205–206 (2d Dist. 1958]; *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S. 2d 291, *aff'd per curiam*, —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972).

VI. WHETHER AN INFORMANT MAY INVOKE THE PRIVILEGE

Statutes

The only state newsmen's privilege statute which provides any indication as to whether the privilege conferred by the statute affords any rights to the informant is the Alaska statute, which provides as follows:

"When a public official or reporter claims the privilege conferred by §§ 150-220 of this chapter and the public official or reporter has not been divested of the privilege by an order of the Supreme or Superior Court, neither he nor the news organization with which he was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court."

It is not clear whether this statutory provision applies only to a civil action wherein a newspaper or reporter pleads reliance upon a source of information as a defense to an action in defamation, or whether, once the privilege has been conferred upon a newsman, he is precluded from revealing the source of his information under any circumstances, unless the source consents in writing or in open court. In either case it is clear that, at least in a limited situation, under this provision of the Alaska statute, it is the informant who makes the decision as to whether his name may be revealed.

Case Law

There have been several cases where the court stated that the newsmen's privilege runs only to the newspaper or reporter and may be waived regardless of the wishes of an informant.

Lipps v. State, —— Ind. ——, 21 Ind. Dec. 342, 258 N.E. 2nd 40 (1970), presented the issue directly. The wife of one of two defendants in a criminal case requested a reporter to speak with her husband. During the course of the interview between the reporter and the defendant, the defendant admitted the crime of murder. The defendant, on appeal of his conviction, argued that the trial court erred by allowing into evidence, over the defendant's objections, the reporter's testimony as to the interview. The appellant claimed that any statements made by him to the reporter were in confidence, and therefore protected under the privilege statute from disclosure.

In upholding the trial court, the Supreme Court of Indiana made clear that "the statute creates the right personal to the reporter which only he may invoke." Since in this case the reporter was willing to testify, the court held that the defendant could not prevent the reporter from testifying by asserting a privilege under the statute. The same holding was reached in *Hestand v. State*, —— Ind. ——, 27 Ind. Dec. 85, 273 N.E. 2d 282 (1971) (a co-defendant of Lipps appealed his conviction).

In *Beecroft v. Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269, 197 A. 2d 416 (1964), the court held that the New Jersey statute confers a privilege on a newspaper, but not upon an informant providing information to the paper and the privilege may be waived regardless of the wishes of the informant. See also, *Lightman v. State*, 294 A. 2d 149, 196, (Md. Sp. App. 1972), *aff'd per curiam*, No. 233 (Md. App., October 7, 1972).

Two of the cases examined, however, indicate that some courts believe that the privilege may be asserted by the informant.

In *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S. 2d 291: aff'd —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972), the court found that an inmate who participated in the Tombs Prison disturbance acquiesced in the publication of his manuscript in the *Village Voice* under his by-line. The court ruled that this defeated the newspaper's argument that the New York statute protected the newspaper against forced disclosure of the manuscript. This seems to infer that the court believes that an informant can waive the newsman's privilege.

In a recent New York case, *In re Dan*, No. —— (Supreme Ct., Wyoming Cty., September 14, 1972), the court made the following statement:

"The interpretation of the statute urged by the witnesses would mean that the news gatherers' exemption to testify would be much broader than any other privilege granted by New York State statute since the newsman would be the sole judge of when and as to what he would testify. Privileged communications whether they be by doctor-dentist-nurse-patient-lawyer-phychologist-social worker-client, husband-wife, clergyman-penitent, have the element of confidentiality between the person holding the privilege and the person to whom confidential communication has been made, which can be waived by the holder of the privilege." Memorandum opinion at 56.

This language seems to indicate that the court views the informant as at least a partial holder of the privilege, with the right to waive the privilege and thereby defeat the newsman's right to assert the newsman's privilege.

VII. RULE OF CONSTRUCTION OF NEWSMEN PRIVILEGE STATUES

The case law is not uniform as to whether a rule of strict or liberal construction should be applied in the interpretation of newsmen's privilege statutes. Some of the courts have ruled in favor of a strict statutory construction of a newsman's privilege statute, either on the basis that the recognition of a privilege is in derogation of common law, or on the basis that the privilege constitutes an exception to the general liability of all persons to testify to all matters. See *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964); *People v. Wolf*, 69 Misc. 2d 256, 329 N.Y.S. 2d 291, *aff'd per curiam*, —— Misc. 2d ——, 333 N.Y.S. 2d 299 (1972); *Beecroft v. Point Pleasant Print & Pub. Co.*, 82 N.J. Super. 269, 197 A.2d 416 (1964). *Lightman v. State*, 294 A.2d 149 (Md. Sp. App. 1972), *aff'd per curiam*, No. 233 (Mr. App. October 7, 1972).

Other courts have adopted a more liberal attitude in favor of the news media. For example, the Supreme Court of Pennsylvania ruled that the Pennsylvania statute must be liberally construed in favor of the newspaper and the news media:

"The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal." *In re Taylor*, 412 Pa. 32, 193 A.2d 181, 185–86 (1936)

The New York newsmen's privilege statute comprises one section of the New York Civil Rights Law. A New York court, in ruling upon a newsman's privilege case, has stated that "Liberal interpretation of pertinent statutes might well be deemed desirable in passing upon the issues of protection of civil rights." *In re WBAI-FM*, 68 Misc. 2d 355, 326 N.Y.S. 2d 434 (1971).

ADDENDUM

STATE NEWSMAN'S PRIVILEGE STATUTES AS OF NOVEMBER 10, 1972

ARKANSAS

Ark. Stat. Ann. § 43–917 (1964)

43–917. Newspaper or radio privilege.—Before any editor, reporter, or other writer for any newspaper or periodical, radio station, or publisher of any newspaper or periodical or manager or owner of any radio station, shall be required to disclose to any Grand Jury or to any other authority, the source of information used as the basis for any article he may have written, published or broadcast; it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare. [Int. Meas. 1936, No. 3, § 15, Act 1937, p. 1384; Pope's Dig., § 3828; Acts 1949, No. 254, § 1, p. 761.]

ALABAMA

Alabama Code Recompiled, Title 7, § 370 (1960)

§ 370. Newspaper, radio and television employees.—No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged, connected with, or employed. (1935, p. 649; 1949, p. 548, effective Aug. 9, 1949.)

ALASKA

Alaska Stat. § 09.25.150 220 (1967), 1970 Cum. Supp.)

Sec. 09.25.150. Claiming of privilege by public official or reporter. Except as provided in §§ 150–220 of this chapter, no public official or reporter may be compelled to disclose the source of information procured or obtained by him while acting in the course of his duties as a public official or reporter. (§ 1 ch 115 SLA 1967)

Sec. 09.25.160. Challenge of privilege. (a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question him in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made to instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest. (§ 1 ch 115 SLA 1967)

Sec. 09.25.170. Order divesting public official or reporter of the privilege. (a) This section is applicable to a hearing held under the laws of this state

(1) before a court other than the supreme or a superior court;

(2) before a court commissioner, referee, or other court appointee.

Sec. 09.25.209. Application of privilege in other courts. Sections 150.220 of this chapter also aply to proceedings held under the laws of the United States of any other state where the law of this state is being applied. (§ 1 ch. 115 SLA (1967)

Sec. 09.25.210. Sections 150 –220 of this chapter do not abridge other privileges. Sections 150.220 of this chapter may not be construed to abridge any of the privileges recognized under the laws of this state, whether at common law or by statute. (§ 1 ch 115 SLA 1967)

Sec. 09.25.220. Definitions In this chapter, unless the context otherwise requires.

(1) "privilege" means the conditional privilege granted to public officials and reporters to refuse to testify as to a source of information;

(2) "public official" means a person elected to a public office created by the constitution or laws of this state, whether executive, legislative or judicial and who was holding that office at the time of the communication for which privilege is claimed;

(3) "reporter" means a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege;

(4) "news organization" means

(A) an individual, partnership, corporation or other association regularly engaged in the business of

(i) publishing a newspaper or other periodical which reports news events, is issued at regular intervals and has a general circulation;

(ii) providing newsreels or other motion picture news for public showing; or

(iii) broadcasting news to the public by wire, radio, television or facsimile,

(B) a press association or other association in individuals, partnerships, corporations, or other associations described in (4(A) (i), (ii), or (iii) of this section engaged in gathering news and disseminating it to ts members for publication. (§ 1 ch 115 1967)

ARIZONA

Ariz. Rev. Stat. Ann. § 12–2237 (1969 Supp.)

§ 12–2237. Reporter and informant

A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding [illegible] trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed. As amended Laws 1960, ch 116 § 1.

CALIFORNIA

Cal. Evid. Code Ann. § 1070 (West Supp. 1971)

§ 1070. Newsman's refusal to disclose news source

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured while so connected or employed for publication and published in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station or any person who has been so connected or employed be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for and used for news or news commentary purposes on radio or television. (Amended by Stats. 1971, ch. 1717, § 1.)

ILLINOIS

Public Act 77–1623, Sept. 23, 1971

Section 1. [S.H.A. ch. 51, § 111]

No court may compel any person to disclose the source of any information obtained by a reporter during the course of his employment except as provided in this Act. The privilege conferred by this Act is not available in any libel or slander action in which a reporter or news medium is a party defendant.

Sec. 2 [S.H.A. ch. 51, § 112]

As used in this Act:

a. "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium; and includes any person who was a reporter at the time the information sought was procured or obtained.

b. "news medium" means any newspaper or other periodical issued at regular intervals and having a paid general circulation; a news service; a radio station; a television station: a community antenna television service; and, any person or corporation engaged in the making of news reels or other motion picture news for public showing.

c. "source" means the person or means from or through which the news or information was obtained.

Sec. 3. [S.H.A. ch. 51, § 113]

In any case where a person claims the privilege conferred by this Act, the person or party, body or officer, seeking the information so privileged, may apply in writing to the circuit court serving the county where the hearing, action or proceeding in which the information is sought for an order divesting the person named therein of such privilege and ordering him to disclose his source of the information.

Sec. 4. [S.H.A. ch. 51, § 114]

The application provided in section 3 of this Act[1] shall allege: the name of the reporter and of the news medium with which he was connected at the time the information sought was obtained: the specific information sought and its relevancy to the proceedings; and, a specific public interest which would be adversely affected if the factual information sought were not disclosed.

Sec. 5. [S.H.A. ch. 51, § 115]

All proceedings in connection with obtaining an adjudication upon the application not otherwise provided in this Act shall be governed by the Civil Practice Act.[3]

Sec. 6 [S.H.A. ch. 51, § 116]

In granting or denying divestiture of the privilege provided in this Act the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

---

[1] Chapter 51, § 113.

[1] Chapter 110, § 1 et seq.

Sec. 7 [S.H.A. ch. 51 § 117]

An order granting divestiture of the privilege provided in this Act shall be granted only if the Court, after hearing the parties, shall find:

(a) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and

(b) that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.

If the court enters an order divesting the person of the privilege granted in this Act it shall also order the person to disclose the information it has determined should be disclosed.

Sec. 8. [S.H.A. ch. 51, § 118]

An order entered under this Act is appealable the same as a comparable order in a civil case under Supreme Court Rules and is subject to being stayed. In case of an appeal the privilege conferred by this Act remains in full force and effect during the pendency of such appeal.

Sec. 9. [S.H.A. ch. 51, § 119]

A person refusiing to testify or otherwise comply with the order to disclose the source of the information as specified in such order, after such order becomes final, may be adjudged in contempt of court and punished accordingly.

INDIANA

Ind. Ann. Stat. § 2–1733 (1968)

2–1738. Newspapers, Television and Radio Station.

Any person connected with a weekly, semiweekly, triweekly or daily newspaper that conforms to postal regulations, which shall have been published for five consecutive years in the same city or town and which has a paid circulation of two per cent [2%] of the population of the county in which it is published, or a recognized press association, as a bona fide owner, editorial or reportorial employee, who receives his or her principal income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a commercially licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives his or her principal income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, press association, radio station or television station, whether published or not published in the newspaper or by the press association or broadcast or not broadcast by the radio station or television station by which he is employed. [Acts 1941, ch. 44, § 1, p. 128; 1949, ch. 201, § 1, p. 673.]

KENTUCKY

Ky. Rev. Stat. § 421.100 (1969)

421.100. Newspaper, radio or television broadcasting station personnel need not disclose source of information.—No person shall be compelled to disclose in any legal proceeding or trial before any court or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the general assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed or with which he is connected. (1649d–1; amed. Acts 1952, ch. 121.)

LOUISIANA

La. Rev. Stat. § 45:1451–54 (1970 Cum. Supp.)

§ 1451. Definitions

"Reporter" shall mean any person regularly engaged in the business of collecting, writing or editing news for publication through a news media. The term reporter shall include all persons who were previously connected with any news media as aforesaid as to the information obtained while so connected.

"News Media" shall include

(a) Any newspaper or other periodical issued at regular intervals and having a paid general circulation;

(b) Press associations;

(c) Wire service;

(d) Radio;

(e) Television; and

(f) Persons or corporations engaged in the making of news reels or other motion picture news for public showing. Acts 1964, No. 211, § 1.

§ 1452. Conditional privilege from compulsory disclosure of informant or source

Except as hereinafter provided, no reporter shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter. Acts 1964, No. 211, § 2.

§ 1453. Revocation of privilege; procedure

In any case where the reporter claims the privilege conferred by the Act, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil Procedure. In case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of such appeal. Acts 1964, No. 211, § 3.

§ 1454. Defamation; burden of proof

If the privilege granted herein is claimed and if, in a suit for damages for defamation, a legal defense of good faith has been asserted by a reporter or by a news media with respect to an issue upon which the reporter alleges to have obtained information from a confidential source, the burden of proof shall be on the reporter or news media to sustain this defense. Acts 1964, No. 211, § 4.

MARYLAND

Md. Ann. Code Art. 35, § 2. (1971)

2. Employees on newspapers or for radio or television stations cannot be compelled to disclose source of news or information.

No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed. (An. Code, 1951, § 2; 1939, § 2; 1924, § 2; 1912, § 2; 1904, § 2; 1896, ch. 249; 1949, ch. 614.)

MICHIGAN

Mich. Stat. Ann. § 28.945(1) (1054)

(Ch. 287—Code of Criminal Procedure)

§ 28.945(1) Same; confidential and privileged communications. Sec. 5a. In any inquiry authorized by this act communications between reporters of newspapers or other publications and their informant are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician. (C. L. '48, § 767.5a.)

MONTANA

Mont. Rev. Codes Ann. Tit. 93, ch. 601-2 (1964)

93-601-2. Disclosure of source of information—when not required. No persons engaged in the work of, or connected with or employed by any newspaper or any press association, or any radio broadcasting station, or any television station for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting or televising news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial or investigation before any court, grand jury or petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent or agents, or before any commission, department, division or bureau of the state, or before any county or municipal body, officer or committee thereof.

NEVADA

Nev. Rev. Stat. § 49.275, 49.385, 49.395 (1971)

49.275 Privilege for news media. No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the legislature or any committee thereof.
3. Before any department, agency or commission of the states.
4. Before any local governing body or committee thereof, or any officer of a local government.

(Added to NRS by 1971, 786)

(Added to NRS by 1971, 786)

49.385 Waiver of privilege by voluntary disclosure.

1. A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter.
2. This section does not apply if the disclosure is itself a privileged communication.

(Added to NRS by 1971, 787)

49.395 Privileged matter disclosed under compulsion or without opportunity to claim privilege. Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the disclosure was:

1. Compelled erroneously; or
2. Made without opportunity to claim the privilege.

(Added to NRS by 1971, 787)

NEW JERSEY

N.J. Stat. Ann. Tit. 2A, ch. 84A, § 21, 29 (Supp. 1969)

2A:84A-21. Newspaperman's privilege

Rule 27.

Subject to Rule 37,[1] a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered. L. 1960, c. 52, p. 458, § 21.

2A:84A-29. Waiver of privilege by contract or previous disclosure; limitations

Rule 37.

A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

---

[1] Section 2A: 84A-29.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question. L. 1960, c. 52, p. 459, § 29.

NEW MEXICO

N. M. Stat. Ann. § 20–1–12.1 (1953, 1967 Rev.)

20–1–12.1. Privileged communication—Reporters.—A. It is hereby declared to be the public policy of New Mexico that no reporter shall be required to disclose before any proceeding or by any authority the source of information procured by him in the course of his employment as a reporter for a news media unless disclosure be essential to prevent injustice. In granting or denying a testimonial privilege under this act [section], the court shall have due regard to the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove. An order compelling disclosure shall be appealable, and subject to stay.

B. As used in this section:

(1) "reporter" means any person regularly engaged in the business of collecting, writing or editing news for publication through a news media, and includes any person who was a reporter at the time the information was obtained but is no longer acting as a reporter; and

(2) "news media" means any newspaper or other periodical issued at regular intervals and having a paid general circulation; a press association; a wire service; a radio station or a television station.

C. Any reporter may waive the privilege granted in this section.

(Laws 1967, ch. 168, § 1.)

NEW YORK

N.Y. Civ. Rights law § 79–h (McKinney 1970)

§ 79–h. Special provisions relating to persons employed by, or connected with, news media.

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing or editing of news for a newspaper, magazine, news agency, press association or wire service.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral or pictorial information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

§ 79-h. N.Y. Civ. Rights Law

(b) Exemption of professional journalists and newscasters from contempt. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity.

Added L. 1970, c. 615, eff. May 12, 1970.

OHIO

Ohio Rev. Code Ann. § 2739.12 (1953)

§ 2739.12 Newspaper reporters not required to reveal source of information. No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

(GC § 6319-2a ; 119 v 286, § 1. Eff 10-1-53)

PENNSYLVANIA

Pa. Stat. Ann. Tit. 28, 330 (1969, 1970 Cum. Supp.)

§ 330. Confidential communications to news reporters.

(a) No person, engaged on, connected with, or employed by any newspaper of general circulation as defined by the laws of this Commonwealth, or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person in any legal proceeding, trial or investigation before any court, grand jury, traverse or petit jury, or any officer thereof, before the General Assembly or any committee thereof, before any commission, department, or bureau of this Commonwealth, or before any county or municipal body, officer, or committee thereof.

(b) The provisions of subsection (a) hereof in so far as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

As amended 1959, Dec. 1, P.L. 1669, § 1 ; 1968, July 31, P.L. —, No. 255, § 1.

PROPOSED STATE "SHIELD" LAWS

In addition to the eighteen states which presently have a reporter's privilege in effect, nine other state legislatures have shown unsuccessful efforts to pass similar legislation in their most recent sessions :

Florida : House Bill 3794, died in committee, 1972.

Idaho : An Act, drafted, never introduced, 1972.

Iowa : House file 1118, never voted, 1972.

Massachusetts : Senate Bill 114, defeated, 1972.

Minnesota : Senate file 945, House file 1728, died in House, 1972.

Missouri : House Bill 18, died in committee, 1971. (Legislature meets biannually.)

Nebraska : Legislative Bills 1179, 1371, never voted, 1972.

Texas : House Bill 205, died in committee, 1972 ; Senate Bill 558, died after committee amendment and recommended passage, 1972.

Wisconsin : Senate Bill 585 (1971), passed Senate and died, 1972.

Three states unsuccessfully sought to amend their existing privilege statutes in the last session. Of these three, the New Jersey bill is the only proposal still pending legislative action this year.

Alaska: Senate Bill 274, died in committee, 1972. The amendment would have repealed Alaska Stat. § 09.25.160, .170(b),(c), and .180 (1967, 1970 Cum. Supp.), thus effectively creating an absolute privilege by removing the present statutory grounds for divestment.

Kentucky: House Bill 586, died in committee, 1972. The amendment would have repealed Ky. Rev. Stat. § 421.100 (1969).

New Jersey: Senate 924, withdrawn 1972; Senate 1121, passed Senate July 17, sent to Assembly and pending in remainder of 1972 session. The amendment would extend the privilege beyond "newspapermen" to any person "connected with any news dissemination"; would describe the proceedings within which the privilege would apply; would protect sources whether or not the information was previously published; and would stipulate that neither a prior or partial diclosure of the source, nor a subsequent termination of the newsman's employment will constitute a waiver of the asserted privilege.

Since our analysis of state newsmen's privilege legislation on November 10, 1972, two state legislatures—those of California and New Jersey—have passed legislation to change their newsmen's privilege statutes. The new California statute and New Jersey proposal[1] are broader in scope than the ones which were in effect when our original analysis was printed. It is perhaps no coincidence that, in both these states, newsmen have been incarcerated within the last few months for contempt of court. The cases of William Farr of California and Peter Bridge of New Jersey are undoubtedly familiar to most persons interested in newsmen's privilege legislation. The reactions of the legislatures of New Jersey and California, however, are probably less well-known and accordingly will be discussed here.

NEW JERSEY

Peter Bridge, an ex-reporter for the *Newark News*, was held in contempt by a grand jury in Newark, New Jersey for failing to answer questions relating to a bribe which Mrs. Pearl Beatty, a Commissioner of the New Jersey Housing Authority, had told him she had been offered. In his article about the bribe, Mr. Bridge had already revealed Mrs. Beatty's name; but before the grand jury, he refused to answer further questions about the information she had given him.[2]

The New Jersey statute under which that case was tried protected only the identity of a source from disclosure. Since Bridge had already identified his source, the court held that he could expect no further protection from the statute. Furthermore, under the old statute, he had waived his privilege against testifying, because he had disclosed a part of the privileged material.

Under the impetus of the *Bridge* situation, the New Jersey legislature passed a new statute which differs in three significant ways from the old:

(1) The new statute protects both the identity of the source of information and the information itself.

(2) The new statute sharply contracts the scope of the waiver provisions, so that any information not already disclosed remains privileged material.

(3) The new statute makes certain that a person will be protected whether he is currently employed as a newsman, or whether, like Bridge, he was so employed only when he received the information.

To counterbalance this expansion, the new law lists circumstances under which the privilege cannot be claimed. These circumstances are analogous to the qualifications in the federal bills. Finally, the new law gives a new and more complete definition to the persons it protects and the type of proceedings it covers.

CALIFORNIA

An amendment to the old California statute was signed into law by Governor Reagan in the first week of 1973. The new statute is drafted so that it protects a newsman from testifying in every conceivable type of proceeding. Specifically, it extends a newsmen's protection from testimony before a "court, the legislature or any administrative body" to testimony before "a judicial, legislative, administrative body or any other body having the power to issue subpenas . . . in any proceeding as defined in § 901.

---

[1] The California legislature's bill was signed into law by Governor Reagan in the first week of 1973. New Jersey's Senate No. 1121 and Assembly No. 1470 have not yet been signed by Governor Cahill.

[2] P. 27–28 of November 10 Analysis.

The amendment of the California statute is as significant for what it does not change as for what it does. On January 17, 1971, the Court of Appeals for the Second District of California affirmed the contempt citation which a trial court judge had imposed on William Farr, an ex-reporter for the Los Angeles Herald Examiner, for his refusal to state the source of confidential information leaked by one of the persons privy to information held secret under an Order re Publicity at the Manson murder trial.[3]

Despite the clear language to the contrary, the Court of Appeals interpreted the California newsman's privilege statute as not protecting Farr, a newsman. *Farr v. Superior Court*, 22C.A. 3d 60, 71–2, 99 Cal. Rptr. 342 (1971). To interpret the statute as protecting Farr, the court noted, would force the court to declare the statute an unconstitutional violation of the concept of separation of powers. Under that concept, "the Legislature cannot declare that certain acts by the Court shall not constitute a contempt." 22 C.A. 3d a 69.

By re-passing its newsman's privilege statute with no change in the language other than that noted, the California legislature has, despite the Court of Appeals decision in Farr, reaffirmed the language of the earlier California statute. It has continued to describe the privilege as one "not to be adjudged in contempt."[4]

It has thus stated its refusal to go along with the court's interpretation of the Constitution. By extending the proceedings covered to include "any body having the power to issue subpoenas," the legislature has stated that the concept of separation of powers does not prohibit newsman's privilege legislation from affecting any judicial proceeding. It is not unreasonable to describe this as a challenge to the constitutional interpretation of the Court of Appeals in the *Farr* case.

NEW JERSEY

Assembly, No. 1470, Senate, No. 1121

Be it enacted by the Senate and General Assembly of New Jersey:

1. Section 21 of P.L. 1960, c. 52 (C. 2A:84A–21) is amended to read as follows:

21. Rule 27. Newspaperman's privilege.

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by, a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

a. the source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. any news or information so obtained whether or not it is disseminated.

Any such person may, however, be compelled to divulge the source and nature of any privileged communications in any of the aforesaid proceedings when all of the following conditions are met: (1) there is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law; (2) there has been demonstrated that the information sought cannot be obtained by alternative means less destructive of rights available under the First Amendment to the Constitution of the United States; (3) the information request is based on the personal knowledge of the newsman rather than on hearsay communications received by him from others; (4) the information requested does not concern matters, or the details of any proceedings, which are required to be kept secret by the laws of the State or the Federal Government.

2. Notwithstanding the provisions of Rule 37 (C.2A:84A–29) or any other law to the contrary, the disclosure by any person of the source, author, agency or person from or through whom any information was procured, supplied, furnished,

---

[3] A 1971 amendment to the California statute extended the privilege to ex-reporters such as Mr. Farr. This was in reaction to the lower court's decision in *Farr*; the Court of Appeals decision had not yet come down.

[4] In our November 10 Analysis, we noted that this languae appeared to be an "effective way of providing an application of the privilege to all proceedings." (p. 16) The *Farr* opinion has now demonstrated its pitfalls.

gathered, transmitted, compiled, edited, disseminated or delivered or any part of any news or information obtained shall not constitute a waiver to that part of the news or information not disclosed. Furthermore, the privilege shall remain in effect with respect to information procured or obtained during the required relationship with the news media, even though that relationship may be terminated at a later date.

3. Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means any newspaper, magazine, press association, news agency, wire service, radio, television or any other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such require relationship is in effect.

4. This act shall take effect immediately.

CALIFORNIA

§ 1070. Newman's refusal to disclose news source

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body or any body having the power to issue subpoenas for refusing to disclose in any proceeding as defined in Section 901 the source of any information procured while so connected or employed for publication in a newspaper.

Nor can a radio or television news reporter or other person connected with or employed by a radio or television station or any person who has been so connected or employed be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for and used for news or news commentary purposes on radio or television.

ADDENDUM NO. 2

A recent check indicates that through inadvertence the State of Rhode Island's Newsman's Privilege Act enacted in 1971 as Chapter 86, § 1 of the Public Law of Rhode Island, was omitted. It is as stated below:

Chapter 19.1—NEWSMAN'S PRIVILEGE ACT

Section.

9-19.1-1. Newspaper defined.
9-19.1-2. Nondisclosure of confidential information.
9-19.1-3. Qualifications.

9-19.1-1. *Newspaper defined.*—A newspaper or periodical as described in this chapter must be issued at regular intervals and have a paid circulation.

History of Section.

As enacted by P.L. 1971, ch. 86, § 1.

9-19.1-2. *Nondisclosure of confidential information.*—Except as provided in § 9-19.1-3, no person shall be required by any court, grand jury, agency, department, or commission of the state of Rhode Island to reveal confidential association, to disclose any confidential information or to disclose the source of any confidential information received or obtained by him in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, news-photographer, or other person directly engaged in the gathering or representation of news for any accredited newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station.

9-19.1-3. *Qualifications.*—(a) The privilege conferred by § 9-19.1-2 shall not apply to any information which has at any time been published, broadcast, or otherwise made public by the person claiming the privilege.

(b) The privilege conferred by § 9-19.1-2 shall not apply (1) to the source of any allegedly defamatory information in any case where the defendant, in a civil action for defamation, asserts a defense based on the source of such information; or (2) to the source of any information concerning the details of any grand jury or other proceeding which was required to be secret under the laws of the state.

(c) In any case where a person claims a privilege conferred by this statute, the person seeking the information or the source of the information may apply to the superior court for an order divesting the privilege. If the court after hearing the parties, shall find that there is substantial evidence that disclosure of the information or of the source of the information is necessary to permit a criminal prosecution for the commission of a specific felony, or to prevent a threat to human life, and that such information or the source of such information is not available from other prospective witnesses, the court may make such order as may be proper under the circumstance. Any such order shall be appealable under the provisions of chapter [24 of title 9] of the general laws.

THE SUBPOENA LOG: A COMPILATION OF CASES TO DATE

Following is a compendium of recent court cases and other developments affecting the free flow of news to the public, compiled by The Reporters Committee for Freedom of the Press (Legal Research and Defense Fund), and distributed to the working press as a public service by The Reporters Committee and the *Columbia Journalism Review*.

Attempts to require news reporters to disclose the source or content of confidential or other unpublished information by court subpoena, by legislative or executive subpoena, or by police arrest or search warrants.

I. COURT SUBPOENA

1. Earl Caldwell of the *New York Times* refused to disclose to a federal grand jury the confidential source of published information about the Black Panthers. The Supreme Court ruled 5 to 4 last June that the Constitution does not grant a newsman's privilege.

2. Paul Pappas of a New Bedford, Mass. TV station refused to disclose to a county grand jury confidential information he obtained during several hours' stay inside a Black militant group's headquarters. The Supreme Court ruled against him, 5 to 4 in the Caldwell decision.

3. Paul Branzburg of the *Louisville Courier-Journal* refused to disclose to a county grand jury his confidential source of information about local drug abuse. The Supreme Court held against him 5 to 4 in the Caldwell decision. Branzburg moved to Michigan; Kentucky authorities say they will seek extradition.

4. TV news reporter Stewart Dan and cameraman Roland Barnes of WGR-TV, Buffalo refused to tell a grand jury what they witnessed inside the Attica prison during the riot. The case is now on appeal. Dan and Barnes claim they would not have been admitted inside the prison if the inmates thought that the newsmen would testify before a grand jury.

5. Reporter Robert Buyer of the *Buffalo Evening News*, who was also in the prison during the riot, did testify on the grounds that he and other newsmen were asked inside the prison because the inmates wanted the press to tell their side.

6. News reporter James Mitchell of Station KFWB in Los Angeles was served with a subpoena by the county grand jury to disclose the confidential source of information about corrupt bail bond practices. The subpoena was quashed in December, partially due to the strong public reaction because of the then-jailed William Farr.

7. Reporter William Farr of the *Los Angeles Herald-Examiner* refused to disclose to a county court judge the confidential source who supplied him with a confession obtained by the prosecution in the celebrated Manson-Tate murder case. The Supreme Court denied his state court appeal; he filed a federal habeas corpus proceeding; in January, Supreme Court Justice William O. Douglas ordered Farr freed from jail after forty-six days, pending the appeal of his federal case. Farr, who was working as a public relations consultant when subpoenaed to disclose his source, now works for the *Los Angeles Times*.

8. Thomas L. Miller, a freelance writer for *Liberation News Service* and several underground papers, refused to disclose confidential information about political dissidents before a federal grand jury in Tucson, Ariz. The Justice Department claimed he was not a news reporter and not entitled to any protection either under the Justice Department guidelines or the Constitution. In December, the Court of Appeals ruled Miller was a member of the press; it is unknown whether there will be an appeal.

9. Peter Bridge of the now-defunct *Newark News* declined to tell a county grand jury unpublished details of an interview with a Newark Housing Commissioner who alleged she had been offered a bribe. He was jailed for three weeks in October. The New Jersey courts ruled that the state newsman's privilege law protecting sources did not protect Bridge because he had named his source.

10. *Milwaukee Sentinel* reporters Gene Cunningham, Dean Jensen, and Stuart Wilk were ordered to disclose, in a federal civil rights hearing, the confidential source of information linking the chairman of the county board of supervisors to contractors doing business with the county. The U.S. Court of Appeals stayed the order; the Supreme Court declined review.

11. Alfred Balk, who had written freelance for the now-defunct *Saturday Evening Post*, refused to disclose, in a federal civil rights case hearing, the confidential source of information about blockbusting in Chicago. In December, the U.S. Court of Appeals upheld Balk, now editor of *Columbia Journalism Review*, by ruling that it would not extend the Caldwell decision; an appeal is planned.

12. Samuel Popkin, Harvard professor and writer on Vietnam affairs, refused to tell a federal grand jury about any confidential discussions he may have had with Daniel Ellsberg involving the Pentagon Papers. The Court of Appeals upheld a contempt order against him; the Supreme Court denied review; Popkin was jailed from Nov. 24 to Nov. 29; he was released after pleas issued by the Harvard community to its alumnus Atty. Gen. Richard G. Kleindienst. As a lecturer and writer, Popkin asserted freedom-of-the-press protection.

13. Managing editor Robert A. Pierce, city editor Thomas N. McLean and reporter Hugh Munn of the *Columbia, S.C. State*, refused to give a local district attorney (solicitor) confidential sources of information about abuses in the county jail. Pierce repeated the refusal before the grand jury in September; no contempt was filed

14. News reporter Harry Thornton of WDEF–TV in Chattanooga refused to disclose the identity of a grand juror who accused the grand jury of conducting a "whitewash" of a local judge. He was held in contempt and jailed for several hours in December, then released on bond; the appeal is pending.

15. Reporters Sherrie Bursey and Brenda Joyce Presley of the *Black Panthers* newspaper refused to disclose to a federal grand jury confidential information about the internal management of the newspaper. The Court of Appeals upheld the reporters in October; it is unknown whether the Government will appeal.

16. *Baltimore Evening Sun* reporter David Lightman was held in contempt for refusing to disclose to a county grand jury the source of information about drug abuse at a seashore resort. The Maryland courts said that Lightman could not invoke the state newsman's privilege law because he obtained the information by posing as a casual shopper, and not by informing his source that he was a newsman; the case is pending in the U.S. Supreme Court.

17. Reporters Jack Nelson and Ronald J. Ostrow and Washington bureau chief John F. Lawrence of the *Los Angeles Times* were subpoenaed to produce confidential tape-recorded information obtained from a key witness in the Watergate bugging trial. Lawrence, who had possession of the tapes, was held in contempt and jailed briefly on Dec. 19, 1972; the contempt order was upheld by the U.S. Court of Appeals, which ruled the Caldwell decision applies to trials; the tapes were released to the court after the witness released the reporters from their promise to keep the information confidential.

18. Reporter Brit Hume, formerly of the Jack Anderson column, was ordered to disclose in a libel case the confidential source of information about an attorney who allegedly removed files from the United Mines Workers offices. The U.S. District Court declined to grant him a newsman's privilege; the case is pending in the U.S. Court of Appeals.

19. Reporter Denny Walsh of the now-defunct *Life* magazine refused to disclose in a libel case the confidential source of information linking St. Louis Mayor Alfonso J. Cervantes to gangsters. The Court of Appeals said Walsh was protected because Cervantes had not proved "malice"; it dismissed the complaint; in January, the Supreme Court denied review.

20. *The Wilmington, Del. News Journal* was ordered in January by a county superior court to produce unpublished photographs of an anti-busing demonstration in order to identify a demonstrator who allegedly shouted an obscenity at police. The newspaper is appealing the order.

21. Brigham Young University student reporters Roger Aylworth and Mike Gygi were subpoenaed in January in Provo, Utah, to disclose to a county grand jury the source of information of a story alleging bribery by local police.

22. Station KCPX in Salt Lake City was ordered to disclose the identity of an artist who did a memory drawing of a courtroom trial in violation of a judge's order barring sketches of the trial.

23. *The St. Louis Post-Dispatch* was subpoenaed by a federal grand jury to produce unpublished photographs of a student demonstration which resulted in the burning of an ROTC building. The *Post-Dispatch* fought the subpoena in the U.S. District court which ruled against the newspaper; the U.S. Attorney then dropped the case.

24. Attorneys for five defendants, accused of disrupting a police meeting, served subpoenas on the *Chicago Tribune*, *Chicago Today*, *The Chicago Sun-Times* and the *Chicago Daily News* in an effort to obtain the names and addresses of all reporters and photographers who attended the disrupted meeting. The subpoena also sought notes of all interviews and the originals of all photos, television film and tape recordings. A circuit judge, in January, quashed the subpoenas as violative of the Illinois newsman's privilege law.

25. Mark Knops, editor of the Madison, Wis., underground newspaper, *Kaleidiscope* was sentenced to six months in jail for refusing to disclose to a grand jury the source of a statement allegedly issued by a radical group claiming it had been responsible for the bombing of the Army Mathematics Research Center at the University of Wisconsin in which one person was killed.

II. BY LEGISLATIVE OR EXECUTIVE SUBPOENA

26. Reporter Joseph Weiler of the *Memphis Commercial Appeal* was threatened with contempt for refusing to disclose to a state legislative investiging committee the confidential source of information about abuses at a home for retarded children. The legislature refused to issue a show cause order in December, and the case appears to be terminated.

27. Reporter Joseph Pennington of radio station WREC in Memphis, threatened with contempt of the legislature, disclosed the name of a woman he said was his source of information about abuses at a home for retarded children. The woman denied being the source; she was fired; the legislative committee recommended to the state attorney general that either Pennington or the woman be indicated for perjury.

28. Reporter Robert Boczkiewicz of the *St. Louis Globe-Democrat* was told that he could be held in contempt in June, if he refused to disclose to a State Ethics Committee investigation the confidential source of information of an article alleging improprieties involving a state supreme court justice; the Committee dropped its demand. The source then released the reporter.

III. BY POLICE ARREST OR SEARCH WARRANT

29. The student *Stanford Daily* in Palo Alto, California, was searched by police with a search warrant seeking photographs to identify demonstrators; as part of the search, police sifted through confidential files; the U.S. District Court condemned police in October.

30. Editor Arthur Kunkin and reporter Gerald R. Applebaum of the *Los Angeles Free Press* (90,000 weekly) were required to disclose the confidential source of information about state narcotics undercover agents. They had to defend themselves against charges of receiving stolen property (i.e., a list of narcotics agents and other documents relating to an investigation of the UCLA campus police department given to the newspaper by a source); the California Supreme Court is deliberating their appeal.

IV. ATTEMPTS TO OBTAIN COPIES OF PUBLISHED INFORMATION

(Local law enforcement and the FBI have frequently obtained the original negatives of film from newspapers and television stations in order to identify demonstrators and other persons whose identity would be difficult to discern using the newsprint photo or a reproduction of the picture as actually televised. There do not appear to be any litigated cases yet. The development of voiceprint machines poses a similar problem with tape recordings.)

31. Radio station WBAL declined to submit to a trial subpoena for original tape recordings of interviews with prisoners involved in the Tombs Prison riot

in New York City. WBAI claimed that the originals could be used to identify prisoners who wanted to remain anonymous. Station manager Edwin A. Goodman was briefly jailed in March, 1972; the New York District Attorney eventually dropped the subpoena.

32. In the Harry Thornton case (see above) station WDEF supplied the trial judge with the original tape of the interview with an anonymous grand juror under a subpoena threat; apparently the tape could not be used to identify the grand juror.

V. STORIES CANCELLED BECAUSE A CONFIDENTIALITY PRIVILEGE COULD NOT BE OFFERED

33. CBS News set up an interview with a woman who said she would disclose how she cheated on welfare if her identity could be masked during the interview and if CBS would promise not to reveal her identity; CBS declined to make the promise and the interview was cancelled.

34. ABC News declined an opportunity to conduct filmed interviews of the Black Panthers in their Oakland headquarters because the network reportedly believed it was unable to make a firm promise of confidentiality.

35. The *Louisville Courier Journal* cancelled further stories about drug abuse because of a subpoena to Paul Branzburg (see above).

36. The *Boston Globe* was unable to pursue investigation of official corruption because sources told the awarding winning Spotlight Investigative Team they were afraid of being identified.

37. *Baton Rouge State Times* reporter Larry Dickinson was unable to pursue a public official corruption story because a key informant said he was afraid of the reporter being subpoenaed. (No connection to prior restraint case above).

VI. ATTEMPTS BY COURTS TO ENJOIN REPORTING OF AND COMMENT ON PUBLIC PROCEEDINGS

38. A Los Angeles County Superior Court judge issued a ban last August against the news media's reporting any facts about a murder case except facts elicited in open court. *The Los Angeles Times* appealed the ban; an appellate court stayed the gag order temporarily; there is no decision on the appeal.

39. A Texarkana, Ark., judge held *Texarkana Gazette* editor Harry Wood in contempt for violating an order which barred the media from publishing a jury verdict in a rape case; the Arkansas Supreme Court voided the conviction in October.

40. A Snohamish County Superior Court judge held *Seattle Times* reporters Sam Sperry and Dee Norton in contempt for reporting details relating to admissable evidence in the jury's absence during a criminal trial. The trial judge had barred the media from reporting any facts except those elicited in open court before the jury; the Supreme Court of Washington voided the convictions in June, 1971.

41. An Oakland, Calif., trial court judge cleared his courtroom of all spectators and the press during argument over the admissibility of evidence in a murder trial. The judge said the jury might disobey his orders and read news accounts of the hearing conducted out of the jury's presence in December.

42. A San Bernardino, Calif., judge ordered the local media not to publish the names of certain witnesses at a trial. The newspapers obeyed the ban and appealed; the trial ended in convictions; in December, an appeals court ruled the censorship order void.

43. New York media were ordered not to report information about the upcoming trial of the alleged Mafia-type Carmine Persico. The *New York Times* broke the order. The judge dropped the matter but then conducted the Persico trial in secret, barring the public and the press; Persico was acquitted; in March, 1972, the New York Court of Appeals ruled that the court should have been open.

44. *Baton Rouge State Times* reporter Larry Dickinson and *Morning Advocate* reporter Gibbs Adams were held in contempt of court for reporting testimony of an open civil rights case hearing in federal court. The contempt was overturned by the U.S. Court of Appeals, which also ruled that a newspaper must obey invalid censorship orders while they are being appealed; the contempt was reimposed in October; the case is pending on appeal.

45. The *Logan Utah Herald Journal* newspaper was ordered by a local trial judge not to publish any additional incriminating stories about a local businessman who was to be tried for misapplication of corporate funds. Several days

later the judge rescinded the order and said he would consult with the newspaper.

46. Maxwell McCrohon, managing editor of the *Chicago Tribune*, was subpoenaed in a libel suit as a third party witness to testify why the newspaper ran a story of a court suit alleging a fraudulent sale of a violin. The seller was suing the buyer for libel. In January, the subpoena was voided under the Illinois newsman's privilege statute.

47. Five news employees of television station KCPX in Salt Lake City, Utah, were subpoenaed to appear at a contempt of court proceeding because the station broadcast an artist's sketch of a court trial in violation of a court order barring drawings. The artist drew the courtroom scene from memory after attending the trial.

VII. ATTEMPTS BY COURTS TO STOP THE NEWS MEDIA FROM CARRYING PERSONAL OPINION ABOUT EVENTS OF PUBLIC INTEREST

48. In the Harry Thornton case (see above), a local judge claimed that it is a crime under the Tennessee grand jury secrecy oath law for a member of a grand jury to give the press his personal opinion about the operation of the grand jury system, i.e. the grand jury investigation was a "whitewash."

49. In the Samuel Popkin case (see above), the Justice Department claimed that it could force Popkin to disclose to a grand jury his personal opinions about the Pentagon Papers affair; the U.S. Court of Appeals voided that section of the contempt order on the grounds that personal opinion is protected from inquiry under the First Amendment.

50. Activist Steve Hamilton served forty days in a California State Rehabilitation Center last March for violating a pretrial publicity order and giving to the press his side of the Berkeley riots; Hamilton claimed he had the right to waive his right to a fair trial because he wanted to answer political accusations by Gov. Ronald Reagan and Alameda county authorities about the riots. Hamilton appears to be the second person in recent history who has been jailed for communicating with the press; the Supreme Court declined review.

51. The Watergate criminal trial: The U.S. District Court issued a broad pretrial injunction against any comment about the bugging trial by "witnesses" and "prospective witnesses." Democrats charged that the order interfered with freedom-of-speech rights to make the Watergate issue a controversy in the campaign. The judge later modified the order to cover the defendants and "all persons acting for or with them" (whatever that means). The original order was interpreted as covering Alfred Baldwin 3rd, who did give a five-hour interview to *Los Angeles Times* reporters Jack Nelson and Ronald J. Ostrow. That interview became the center of the attempt (noted above) to obtain the tape recordings; however, the trial judge never alluded to the order in the hearings to turn over the tapes.

52. Oscar Mellin, publisher of the Calaveras County, Calif. *Enterprise* was subpoenaed to show cause why he should not be held in contempt of Judge Howard W. Blewett for writing an editorial saying that Judge Blewett conducted a "kangaroo court." The charge was prompted when Judge Blewett fined a dog owner for permitting his dog to run loose and dig up the judge's vegetable garden.

VIII. ATTEMPTS TO CENSURE REPORTING ABOUT GOVERNMENT OPERATIONS

53. Dr. Daniel Ellsberg is accused, among other charges, of "stealing" government property—i.e., the Government-compiled facts contained in the Pentagon Papers. The indictment and the supporting briefs stand for the proposition that government-compiled facts about the operations of government agencies and about the decision-making process of government officials are owned by the Government, a theory that counters the traditional concept in this country that government information belongs to the citizenry. This case also means that the *New York Times* could be indicted for receiving "stolen property," i.e. the Pentagon Papers.

54. An editor and a reporter for the *Los Angeles Free Press* (see above) have been convicted on charges of receiving stolen property. The property was a list of civil service employees, some of whom were acting as undercover narcotics agents. The list was copied from a list in the state attorney general's office and given to the newspaper for publication. This is the state version of the Ellsberg prosecution.

55. William Farr (see above) was called upon to disclose the source who supplied him a confession obtained by government officials in the Manson murder case. While several commentators have noted the sensationalism of obtaining and publishing the confession, it should also be noted that—suppose, for example—the confession implicated an influential citizen who was not indicted, or that the confession was obtained by torture; one could make the argument that the press should be free to report about the operations of government officials performing official functions.

56. Leslie Whitten, a reporter for the Jack Anderson column, was arrested by the FBI in late February on a charge of receiving stolen government property—the contents of documents others had removed from the Bureau of Indian Affairs

57. The *Los Angeles Free Press* was denied police press passes to cover news in restricted areas; the Supreme Court denied appeal.

58. *Los Angeles Free Press* photographer Ron Ridenour claims police destroyed film he had taken of police abusing a paraplegic antiwar leader at a demonstration. (Mr. Ridenour was sentenced to a year in jail on charges of assaulting a policeman).

IX. REPORTERS—RATHER THAN PUBLISHERS—HELD IN CONTEMPT OF COURT ORDERS BARRING PUBLICATION

59. The Reporters Committee takes the position that publishers, not reporters, legally control what is published and, therefore, the proper contemnors of orders barring publication of news stories are publishers. In this connection, the Committee cites the above cases of 1) the *Seattle Times*, 2) the *Baton Rouge State Times*, and 3) the *Baton Rouge Morning Advocate*; 4) the *Texarkana* case poses a problem because Mr. Wood, as executive editor, may exercise enough management control to be personally liable for what is published in the Gazette; 5) a similar problem is posed by the *Wiliam Farr* case; a reading of the in camera transcript leaves the impression that had Farr's newspaper declined to publish the Manson case confession, then the judge would have dropped the matter as quid pro quo; in that case, of course a management representative of the *Herald-Examiner* should have been in jail rather than Farr.

X. STATE LAWS PROTECTING NEWSMEN HAVE BEEN INTERPRETED NARROWLY TO FORCE DISCLOSURE OF CONFIDENTIAL SOURCES AND UNPUBLISHED INFORMATION

60. A California appeals court ruled that William Farr was not entitled to the protection of the state shield law because the state legislature had no power to invade the "inherent and vital power of the court to control its own proceedings."

61. The trial judge in the William Farr case ruled that the state shield law did not protect Farr because—at the time he was served with the subpoena seeking his confidential source—he was employed as a public relations consultant and not a newsman.

62. The Kentucky courts ruled that Paul Branzburg was not entitled to the protection of the state shield law because his sources ceased to be sources but became "criminals" when they demonstrated how they produced hashish.

63. The Maryland courts ruled that David Lightman was not protected by that state's shield law because he obtained his information as a casual shopper and not by announcing he was a newsman.

64. The New Jersey court ruled that Peter Bridge was not entitled to that state's shield law protection because he had disclosed his source.

POST-COMPENDIUM POSTSCRIPT

65. Thomas Hennessy, publisher-reporter of the weekly newspaper *Pittsburgh Forum*, was asked by defense attorneys in a federal court hearing to identify the confidential source who supplied information for an article about defendant Anthony Gross, reputed head of the numbers racket in the Pittsburgh area. Mr. Hennessy refused to reveal his sources, but is expected to be recalled.

66. Republican attorneys in the civil suits arising from the Watergate bugging case issued subpoenas seeking testimony and notes from 11 reporters and officials of *The Washington Post*, *The Washington Star-News*, *New York Times*, and *Time* Magazine, on February 26, 1973. The reporters and officials are all opposing the subpoenas.

67. Using the recent arrest of Leslie Whitten as a pretext, the FBI has secretly subpoenaed the telephone records of Jack Anderson and his associates. The stipulated purpose of the subpoena, granted on February 2, 1973, was the investigation of the Bureau of Indian Affairs documents, but the FBI subpoena covers a period extending four months before the documents were stolen. Mr. Anderson has filed suit in Federal District Court.

SYNOPSIS OF NEWSMEN'S PRIVILEGE LEGISLATION

(Prepared by Subcommittee on Constitutional Rights)

S.J. RES. 8

Sponsor: Hartke.

Jurisdiction: Applies to Federal proceedings only.

Nature of the privilege: Absolute protection of sources and information for broadcast.

Coverage: Protects employees, others associated with media outlets and those independently engaged in gathering information for publication or broadcast.

How privilege is claimed: The bill is silent on this point. Presumably the reporter must move to quash the subpoena or answer it and assert the privilege when asked a question.

Libel exception: None.

S. 36

Sponsor: Schweiker.

Jurisdiction: Applies only to Federal proceedings.

Nature of the privilege: The bill provides an absolute privilege to protect sources and information in investigative proceedings. It provides a qualified privilege to protect sources and information in court proceedings.

Coverage: Privilege may be claimed by any person acting in his capacity as a reporter, editor, etc., or other person "directly engaged" in gathering or presenting news over various news media.

How privilege is divested: Party seeking the information from the newsman in a court proceeding must apply for an order divesting the privilege in U.S. District Court. He must show that the information he seeks is (1) clearly relevant to a probable violation of law, (2) no alternative means to obtain it and (3) there is compelling and overriding national interest in the information. Presumably, the newsman must first be subpoenaed and then, when asked a question, may claim the privilege. At this point, the person seeking disclosure must institute the above proceeding.

Libel provision: No exception for libel cases is made.

S. 158

Sponsor: Cranston.

Jurisdiction: Applies to both Federal and State proceedings.

Nature of the privilege: Absolute protection of sources and unpublished information.

Coverage: Any "person" engaged in the gathering, receiving or processing of information for any medium of communication to the public.

How privilege is claimed: It is absolute where found to apply. The bill is silent on how the privilege is claimed. Presumably, the newsman would have to quash the subpoena or answer it and assert the privilege when asked a question.

Libel exception: None. Reporter could presumably assert in a libel case.

S. 318

Sponsor: Weicker.

Jurisdiction: Applies to Federal proceedings only.

Nature of the privilege: Two-tiered. Absolute protection for sources and information which may lead to their identity in investigative proceedings (grand juries, legislative committees, administrative agencies, etc.). Qualified protection for sources and information leading to their identity in certain court proceedings.

Coverage: Bill attempts to limit the privilege to "legitimate members of the professional news media," as defined in Section 3.

How the privilege is divested: The party seeking information from a person entitled to coverage must apply in a separate proceeding to have the privilege divested. He must state in his application; the nature and relevance of the evidence he seeks from the reporter, also, that it is not reasonably available by alternative means, and that reasonable diligence has been used to seek this alternative evidence. These conditions must be established in court, and furthermore the court is only to grant divestiture if the subject court proceeding involves murder, forcible rape, aggravated assault, kidnapping, airline hijacking, or when a breach of national security has been established.

Libel exception: The bill provides that a separate proceeding to obtain divestiture may also be instituted where the newsman as defendant in a libel suit asserts a defense based on the source.

S. 451

Sponsor: Hatfield.

Jurisdiction: Applies to Federal proceedings only.

Nature of the privilege: Absolute protection for sources and information.

Coverage: Any person who is employed by or otherwise associated with any newspaper, periodical, press association, newspaper syndicate, wire service, or radio or television station, or who is independently engaged in gathering information for publication or broadcast.

How the privilege is claimed: The bill is silent on this matter. Presumably, the newsman must move to quash the subpoena or must answer the subpoena and then assert the privilege in refusing to answer a question.

Libel exceptions: The bill provides that the privilege cannot be claimed by a newsman sued for libel.

S. 637

Sponsor: Mondale.

Jurisdiction: Applies to both federal and state proceedings.

Nature of the privilege: Qualified protection for sources and for unpublished information whether or not it leads to source.

Coverage: Broad. Any person gathering, receiving or processing information for any medium of communication to the public.

How the privilege is divested: Party seeking divestiture of the privilege from one entitled to the privilege must initiate a court proceeding prior to the issuance of a subpoena to the newsman. The court must find: (1) probable cause that the newsman possesses information clearly relevant to a specific probable violation of the law, (2) the court has jurisdiction over the specific probable violation involved, (3) the information cannot be obtained by alternative means, and (4) there exists an imminent danger of foreign aggression, of espionage, or of threat to human life, which cannot be prevented without disclosure of the soure or information.

Libel exception: None. Presumably, the privilege may be claimed by the newsman in a libel suit.

S. 870

Sponsor: Bentsen.

Jurisdiction: Applies to both Federal and State proceedings.

Nature of the privilege: Qualified protection for sources and for unpublished information whether or not it leads to the source.

Coverage: Attempts to limit to "professional newsmen" as defined in Section 4.

How the privilege is divested: The Party seeking the information must obtain a court order after a hearing and determination by the court that the information sought cannot be obtained by alternative means and it involves a compelling and overriding public interest or the information sought involves a matter of national security.

Libel exception: The privilege cannot be claimed by a newsman who is a defendant in a defamation suit.

S. 870

Sponsor: Eagleton.

Jurisdiction: Applies to both federal and state proceedings

Nature of the privilege: Absolute protection for "confidential" sources, and for "confidential" information obtained in the course of gathering, compiling, etc., news for dissemination through a news medium.

Coverage: All "persons" engaged in an activity whose primary purpose is the gathering, compiling, etc., of news.

How privilege is divested: The burden is upon the party seeking the information to obtain an order *prior* to the issuance of a subpoena that a newsman is not entitled to the protections of the statute. In a court proceeding, a subpoena may issue if either the testimony sought relates "exclusively to matters unconnected" with the newsman's work or the court finds (1) reasonable grounds to believe the person has information which is not entitled to protection and which is material to the controversy; (2) there is a factual basis for the claim of the party to the controversy to which the newsman's testimony relates; and (3) the information is not available from an alternative source. In a proceeding other than a court proceeding, a subpoena will issue only if the tribunal determines that the information sought is "exclusively unconnected" with the newsman's work.

Libel exception: The bill provides that the statute will not affect the rights or liabilities of any person under the law of defamation. Presumably where federal or state courts have recognized some privilege in libel suits, it would not be affected.

SYNOPSIS OF THE PRIMARY ISSUES INVOLVED IN THE PENDING NEWSMEN'S PRIVILEGE PROPOSALS

1. Should the privilege be absolute or should it be qualified? Or in the alternative, should it be absolute in some forms and qualified in others?

    a. Can the privilege be qualified and still give adequate protection to newsmen and assurance to sources?

    b. In view of the competing interests in the administration of justice, is an absolute privilege advisable?

2. If the privilege should be qualified, then what should be the qualifications?

    a. If the qualifications are broad and general, can sources be assured how the courts will interpret them?

    b. If the qualifications are specific and narrow, will the courts have enough flexibility to prevent injustice?

3. Should the privilege apply to state as well as federal proceedings?

    a. Does Congress actually have the power to legislate a testimonial privilege for state proceedings?

    b. Is a violation of our doctrine of federalism entailed?

4. Should the privilege protect only the sources of confidential information or should it encompass unpublished information, whether given in confidence or not?

5. Who should be able to claim the privilege?

6. What should be the procedure through which the privilege is claimed or divested?

    a. Should the burden of proof to show entitlement to the privilege rest with the newsman or with the government?

    b. At what stage of the proceedings should this showing be made?